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IN THE

Supreme Court of the United States

October Term, 1970

No. 1117

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. MARK FEIN,

Petitioner,

against

HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, OF THE STATE OF NEW YORK

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PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, OF THE STATE OF NEW YORK

The petitioner, Mark Fein, prays that a writ of certiorari be issued to review the final judgment of the Supreme Court, Appellate Division, Second Department, of the State of New York, the highest court of the State of New York in which a decision could be had.

Opinions Below

The Supreme Court, Appellate Division, Second Department, of the State of New York, rendered a memorandum opinion which is reported at 34 A.D. 2d 835, 312 N.Y.S. 2d 531 (2d Dep't 1970). It is reproduced as Appendix I, *infra*, pp. 1a-2a.

The Appellate Division affirmed a judgment of the Supreme Court, Dutchess County, Grady, J., presiding. Justice Grady's opinion is reported at 61 Misc. 2d 826, 306 N.Y.S. 2d 789 (Sup. Ct., Dutchess County 1970). It is reproduced as Appendix II, *infra*, pp. 3a-14a.

Jurisdiction

After the final judgment of the Supreme Court, Appellate Division, Second Department, of the State of New York, on May 25, 1970, the petitioner filed a notice of appeal as of right to the Court of Appeals of the State of New York. The respondent made a motion to dismiss the appeal, which was granted "upon the ground that no substantial constitutional question is directly involved". 27 N.Y. 2d 737 (July 2, 1970). Then the petitioner made a motion for leave to appeal to the Court of Appeals of the State of New York. The respondent opposed this motion. On September 24, 1970 the Court of Appeals of the State of New York denied the petitioner's motion for leave to appeal. 27 N.Y. 2d 486, App. IV, p. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Did New York Judiciary Law §597, which as applied in New York County by the County Clerk, resulted in the automatic, total, and systematic exclusion of individuals who had conscientious scruples against capital punishment from the venire or panel from which the grand jury which indicted petitioner was chosen, violate the due process and equal protection clauses of the Fourteenth Amendment?

2. Did New York Judiciary Law §597, which, as applied by the County Clerk of New York County, resulted in the automatic, total and systematic exclusion of scrupled individuals from the venires or panels from which the petit jury which convicted petitioner was taken, violate the due process and equal protection clauses of the Fourteenth Amendment as well as the Sixth Amendment's requirement for trial by an impartial jury, made fully applicable to the states by the due process clause of the Fourteenth Amendment?

3. Did the trial judge's *voir dire* of the jury in the jury room near the end of the trial, without the petitioner's personal presence, violate the due process clause of the Fourteenth Amendment?

Constitutional, Statutory and Other Provisions Involved

1. United States Constitution, Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *"

2. United States Constitution, Fourteenth Amendment, Section 1

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. New York Judiciary Law, §680

"COUNTY CLERK TO SELECT, DRAW, SUMMON AND EMPANEL JURORS

"The county clerks of the counties included within a city having a population of one million or more shall select, draw, summon and empanel all jurors for all courts within their respective counties and shall decide upon their qualifications and exemptions, in the manner prescribed by this article, those sections of the code of criminal procedure regarding grand jurors, or the rules adopted pursuant thereto, provided, however, that when preparing ballots for jurors, he shall indicate on the ballot of each juror whether he has conscientious scruples against the death penalty as would prevent him from returning a verdict of guilty of any crime punishable by death. But this section shall not operate to impair the right to challenge a particular juror at a trial."

4. New York Judiciary Law, §597:

"JURORS WITH SCRUPLES AGAINST DEATH PENALTY

No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty *and* that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of any crime punishable by death. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above. A judge presiding at a term of court at which a crime punishable by death is to be tried may direct that a separate drawing be conducted for the jurors to report for trial of such crime and that only the ballots of jurors who have stated that they have no such scruples shall be placed in the ballot box from which such jurors are to be drawn." (emphasis supplied).

5. Code of Criminal Procedure, §356:

"APPEARANCE

"If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel but if the indictment be for a felony the defendant must be personally present."

6. Code of Criminal Procedure, §376:

"PARTICULAR CAUSES OF CHALLENGE

"Particular causes of challenge are of two kinds:

1. For such a bias, as, when the existence of the facts is ascertained, does in judgment of law disqualify the juror, and which is known in this Code as implied bias;

2. For the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that such juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this Code as actual bias. But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath, that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied, that he does not entertain such a present opinion or impression as would influence his verdict."

7. Code of Criminal Procedure, §377, subdivision 8:

"GROUND OF CHALLENGE FOR IMPLIED BIAS

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

• • •

8. If the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror."

8. Code of Criminal Procedure, §427:

"MAY RETURN INTO COURT, FOR INFORMATION

After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being

brought into court, the information required must be given after notice to the district attorney and to the counsel for the defendant, and in cases of felony, in the presence of the defendant."

9. Rule 2 of the Rules of the Jury System in the City of New York, New York Judiciary Law, App. 388:

"EXAMINATION; QUESTIONNAIRES; INDEX CARDS OR BOOKS

• • •

A county clerk, instead of using index cards, may keep the required information in properly indexed books. In such event, whenever index cards are referred to in these rules, the reference shall be deemed to include such books."

10. Rule 17 of the Rules of the Jury System in the City of New York, New York Judiciary Law, App. 398:

"FORM OF QUESTIONNAIRE

• • •

Have you such views concerning the death penalty as would prevent you from finding a defendant guilty if the crime charged be punishable by death • • •"

11. Former Section 749-aa of the New York Judiciary Law*

"SPECIAL JURORS IN CERTAIN COUNTIES

1. List of special jurors. The county clerk of each county of the state having a population of one

* This is the text of Section 749-aa (being also known as Article 18-B of the New York Judiciary Law) as it was in effect at the time of petitioner's indictment and trial. Subsequently, Section 749-aa was repealed in its entirety by New York Law 1965, c. 778, §3, effective September 1, 1965.

million or more inhabitants, according to the last preceding federal census, shall select from the persons qualified to serve as trial jurors in such county such number of special jurors as the justices of the appellate division of the supreme court, or a majority of them of the department in which such county is situated shall, from time to time direct. The names of the persons so selected liable to serve as special jurors shall be alphabetically arranged, with their places of business and the residence of each. Such county clerk, from time to time, may cancel such selection and strike the names of such special jurors from such list and select other special jurors in their places. Persons who are selected as aforesaid by such clerk to act as special jurors shall be exempt from all other jury duty from and after the date of their selection, and they shall remain so exempt so long as they continue to be such special jurors.

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice

against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. Examination as to fitness; subpoena; punishment for disobedience. No person shall be selected as a special juror until he shall have been examined personally by the county clerk, his deputy, secretary, or any other employee of the county clerk's office duly authorized by the county clerk and approved by the presiding justice of the appellate division, as to his qualification and fitness to serve as a special juror. Such county clerk may issue a subpoena requiring any person within such county to attend before him, his deputy, secretary or any other employee of the county clerk's office duly authorized by the county clerk and approved by the presiding justice of the appellate division, at a time specified for the purpose of testifying concerning the qualification or fitness of himself or any other person to serve as a special juror, and the propriety of the selection of such special juror. A person so subpoenaed must attend and testify accordingly. In case of his failure to attend and testify as required by such subpoena, or a refusal to be sworn, or to answer any legal or pertinent question, he shall be punished therefor by any justice of the supreme court as a contempt of court. A subpoena issued under this section shall be regulated by the civil practice law and rules, except that no fees are required to be paid to any person so subpoenaed. The record of the jurors selected as such special jurors, shall contain the age of each special juror so selected, his business or vocation, if any, the length of his residence in the state and county and, if

naturalized, the date of his naturalization. Such record shall be a public record and shall be open to inspection.

4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action, or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be tried. It must be made upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. The order must specify the time when the drawing of such special jury shall take place and the number of special jurors to be then drawn, the term of the court and particular day in the term when such special jury must attend. The day so specified for the attendance of the special jury must, except in the case of an order for additional special jurors drawn under subsection six of this section, be at least

five days in addition to any Sunday, holiday or half-holiday after the day specified for the drawing of the special jury.

5. Drawing; notification of jurors. At the time specified in the order the special jury shall be drawn at the office of the county clerk as provided in section six hundred and two of this chapter. A minute of the drawing must be kept by the county clerk, or his deputy, which must be entitled in the action in which the jury is to serve specifying the term of court and the particular day in the term when the special jurors so drawn must attend; and there must be entered thereon the name of each juror drawn. Such minute must be signed by the judge or justice and by the county clerk, or his deputy, present at the drawing and such minute so signed must be filed in the office of such county clerk. Such county clerk must notify each juror therein named in the manner provided for trial jurors, except that provisions as to intervals of time with regard to the notification of trial jurors shall not apply. Before the day specified for the attendance of the special jurors the county clerk must file with the clerk of the trial court, part or term at which the juror is required to attend, a certified copy of the minute with a return indorsed thereon or annexed thereto specifying the manner in which each juror was notified and the time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom such service shall have been made, stating the manner, time and place of such service shall accompany such return.

6. Additional jurors; drawing. If the panel of the special jurors thus drawn shall be exhausted before a jury is completed, or if the trial court shall be of the

opinion that additional special jurors will probably be needed to complete the jury, the trial court may, from time to time, direct that such additional special jurors be drawn for the trial as it may deem expedient. The order must specify the number to be drawn, the time of the drawing and the time when such additional jurors shall be required and notified to attend. Such additional drawing shall be made by the same officers authorized to draw the special jurors, either in open court in the presence of the judge or justice presiding at the trial, or at the office of the county clerk as prescribed in such order, and shall be conducted in the same manner as the original drawing and a minute thereof kept and certified as prescribed for the original drawing and the jurors so drawn shall be summoned in the same manner as those originally drawn.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. Revision of list. In each county of the state to which this section applies, the names selected and composing the special jury list heretofore compiled, shall be the special jury list for such county subject to such revision thereof by striking therefrom and adding thereto the names of such jurors as from time to time the county clerk shall deem proper.

9. Appellate division to make rules. The justices of the appellate division of the supreme court of the department embracing the county in which such special jury list shall be constituted shall make such rules and regulations not inconsistent with the provisions of this section as shall be necessary to regulate the making of the application for a special jury under the provisions of this section for the drawing and attendance of such jurors and for the proper and efficient enforcement of the provisions of this section.

10. Duties of commissioner of jurors in certain counties. In the event that the office of commissioner of jurors has been established in a county to which the provisions of this section are applicable all of the powers and duties conferred or imposed upon the county clerk by this section are transferred to and shall hereafter be exercised and performed by the commissioner of jurors of such county.

11. Violations of section or rules, penalty. Any violation of this section, or of such rules and regulations prescribed by the appellate division of the supreme court shall be deemed a contempt of court under section seven hundred fifty of the judiciary law and such rules and regulations may be enforced as if a violation thereof were such a contempt as provided by section seven hundred fifty-one of the judiciary law."

Statement of the Case

All three of the federal questions sought to be reviewed by the instant petition for a writ of certiorari were raised by a verified petition for a writ of habeas corpus in the Supreme Court, Dutchess County, of the State of New York. A copy of this verified petition is reproduced as Appendix III, *infra*, pp. 15a-34a.

The Supreme Court, Dutchess County, Grady, J., presiding, ruled adversely on all three questions. *People ex rel. Fein* v. *Follette*, 61 Misc. 2d 826, 306 N.Y.S. 2d 789 (Sup. Ct. Dutchess County 1970). The Supreme Court, Appellate Division, Second Department, affirmed that judgment, again ruling adversely on all three federal questions involved. *People ex rel. Fein* v. *Follette*, 34 A.D. 2d 835, 312 N.Y.S. 2d 531 (2d Dep't 1970). The Court of Appeals of the State of New York denied review.

The courts below erroneously treated this case wholly as a *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), situation. But primarily it is a systematic exclusion case. Just as the systematic exclusion of Negroes from grand juries violates the due process and equal protection clauses of the Fourteenth Amendment, so the systematic exclusion of scrupled jurors from grand juries violates these clauses. Just as the systematic exclusion of women from grand juries violates the due process and equal protection clauses of the Fourteenth Amendment, so the systematic exclusion of scrupled individuals violates these clauses. Just as the systematic exclusion of daily wage earners from grand juries violates the due process and equal protection clauses of the Fourteenth Amendment, so the exclusion of scrupled individuals violates these clauses. Just as the systematic exclusion of those who do not demonstrate a belief in God from grand juries violates the due process and equal protection clauses of the Fourteenth Amendment, so the exclusion of scrupled individuals violates these clauses. Just as the systematic exclusion of any recognizable, identifiable group, be it racial, ethnic, sexual, religious, ethical, eco-

nomic, social, political, or geographical, from grand juries violates the due process and equal protection clauses of the Fourteenth Amendment, so the systematic exclusion of scrupled individuals violates these clauses.

Moreover, in a systematic exclusion case, there is no need to make any specific showing of prejudice. Furthermore, the petitioner did not waive any of his constitutional rights.

New York Judiciary Law §597, as applied in New York County, resulted in the systematic, total, and automatic exclusion of all individuals who might have stated broadly that they had conscientious scruples against capital punishment, without any further questioning, or the opportunity for it, of those individuals as to the nature or nuances of their beliefs or their ability or likelihood in certain cases of putting aside their scruples. As Justice Grady in the trial court put in his opinion: "It appears that a yes answer resulted in an automatic disqualification of the prospective juror" (61 Misc. 2d at 829, 306 N.Y.S. 2d at 792, App. II at 6a). In 1964, when the petitioner's trial which resulted in his illegal sentence of 30 years to life occurred, scrupled individuals constituted a recognizable, identifiable group consisting of more than half of the people in New York County.

The systematic exclusion of individuals who had conscientious scruples against capital punishment from the venires or panels from which the grand jury which indicted petitioner was taken violated the due process and equal protection clause of the Fourteenth Amendment.

The systematic exclusion of individuals who merely stated generally that they had conscientious scruples against capital punishment from the venires or panels from which the special jury was taken which tried petitioner, plus the additional exclusion of women and members of lower economic groups from this special jury, violated the due process and equal protection clauses of the Fourteenth Amendment as well as the Sixth Amendment's requirement for trial by an impartial jury, made fully applicable to the states by the due process clause of the Fourteenth Amendment.

The third reason why the petitioner's present restraint is unlawful is that the trial judge conducted part of the petitioner's trial without the petitioner being personally present. Near the end of the trial, and on November 18, 1964, Jimmy Breslin had a lengthy article in the New York Herald Tribune. The contents of the article would indicate that it was inspired by Frank Lyons, one of the detectives on the prosecutor's staff. Breslin categorically stated that petitioner killed the decedent, made fun of petitioner's conduct in the courtroom, called petitioner's father a millionaire and gave a maudlin account of some of the next of kin of decedent. Because of the article's particularly prejudicial nature, defense counsel promptly brought it to the court's attention. The trial record shows:

> "Mr. Kleinman: Your Honor, I know that you have very scrupulously instructed the jury not to read and not to discuss and not to comment on the case, all the usual admonitions and instructions were given that the jury should not be the least bit disconcerted from their duties here in the courtroom and I appreciate

that, and I want to thank Your Honor for all the admonitions you have given the jury.

I just place before Your Honor a column written by the columnist Jimmy Breslin of the New York Herald Tribune. It is on the first page of the second section of the newspaper of November 18th.

In my opinion, the column—and I don't want to characterize it too much—is one which is extremely detrimental to the defense, and I should like to have the column marked as an exhibit, so that if any reference is made to it we will have something on the record to indicate what we are talking about.

I should ask Your Honor most respectfully to address the jury to find out if they happened to see or look at a column written by this Jimmy Breslin in today's Tribune.

The Court: Do you want me to do that in open court or what?

Mr. Kleinman: I leave it entirely to Your Honor. I don't want to make any fuss about it in open court, and I don't think it will do any good to do it in open court. It will simply accentuate it.

Mr. Dermody: Yes, that is the danger.

The Court: I will do it in the jury room.

Mr. Kleinman: May I have it marked?

The Court: It is marked for identification.

(New York Tribune for November 18, 1964 marked Defendant's Exhibit R for Identification.)

The Court: Mr. Renfroe, gentlemen of the jury: Do not discuss any fact or feature of the case. The jury will retire to the jury room.

(The following took place in the juryroom, all the jurors and alternate jurors being present, and also all counsel.)

The Court: It has been called to the Court's attention that an article has appeared this morning on the first page of the second section of the Tribune.

The whole column was in reference to this case. Have any of you gentlemen seen it?

A Juror: I saw it.

The Court: Did you read it?

A Juror: I saw it but I didn't read it.

The Court: I cannot admonish you more strongly than I am at the present time, and I have advised you time and time again not to look at or read anything pertaining to this case. Now, if you do so, gentlemen, you do so under penalty of penal imprisonment. You have already been told that. Otherwise the whole case would have to be set aside and retried.

I tell you not to look at any papers or have anyone call anything to your attention concerning this case, or anything that may be written by anyone any place, at any time.

Now, is that definitely understood?

Nobody has read this article?

Jurors: No, sir.

The Court: Don't let this be a suggestion that you should inquire about it, because you are absolutely forbidden to do so. Thank you." (App. III at 22a-24a.)

Without the petitioner's knowledge, consent or presence, the trial judge during the course of the trial conducted a voir dire of the jurors in the jury room. This course of conduct, about which petitioner was not even consulted, was most prejudicial to him; for the voir dire was conducted in a perfunctory manner. One juror admitted that he had seen the Breslin article, but added that he had not read it. Nevertheless there was no further probing. Had petitioner been present he could have urged upon his counsel further questions. He could have urged that the juror be asked what he had seen. He could have urged that the juror be asked what the headline was. He could have urged that the juror be asked whether he saw the sub-headings "A Look

of Hate" and "A Dazed Son". He could have urged that the juror be asked what his reactions were to these subheadings. The error of the petitioner not being personally present was aggravated by the further fact that at the beginning of the trial, the trial judge remanded him, although he had been out on bail theretofore, and there was no basis for the remand. Thus the petitioner could not keep fully abreast of what was happening, including the appearance of the Breslin article. Not knowing about the Breslin article, he of course did not consult with his counsel about it. Even if he had known about the Breslin article, he would have been handicapped in his consultations with his counsel, for he was in custody.

Indeed, the petitioner did not even know what was going on when the judge was conducting his *voir dire* of the jurors in the jury room about the Breslin article. He was not even in the courtroom. The trial judge's conduct in the jury room violated the due process clause of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

I

New York Judiciary Law §597 which, as applied in New York County by the County Clerk, resulted in the automatic, total, and systematic exclusion of individuals who had conscientious scruples against capital punishment from the venire or panel from which the grand jury which indicted the petitioner was chosen, violated the due process and equal protection clauses of the Fourteenth Amendment.

A. Section 597 of the New York Judiciary Law Is an Unconstitutional Anachronism.

To retain on the statute books a piece of legislation which, as applied in New York County, results in the systematic exclusion of all individuals who merely state that they have conscientious scruples against capital punishment from the venires or panels from which grand as well as petit juries are taken, and petit juries not only in capital but also in noncapital cases, and petit juries not only in criminal cases but also in civil cases, and this is in a state which has largely abolished capital punishment, is either legislative oversight or else it is legislative unconcern with all constitutional safeguards placed upon the states by our federal Constitution. New York with two exceptions (murder of a peace officer, or murder by one in prison on a life sentence) has abolished the death sentence. See Section 125.30 of the New York Penal Law, effective September 1, 1967, as well as sections 1045 and 1045-a of the former New York Penal Law of 1909, as amended. Yet section 597 of the New York Judiciary Law still unconstitutionally provides for the systematic exclusion of scrupled jurors from the venires or panels from which grand as well as petit

jurors are taken, and petit jurors not only in criminal but also in civil cases. Section 527 is an unconstitutional anachronism which the Court should strike from the statute books. As applied in New York County by the County Clerk, it violates no less than three different provisions of the federal Constitution: the due process clause of the Fourteenth Amendment; the equal protection of the laws clause of the Fourteenth Amendment; and the Sixth Amendment's requirement for trial by an impartial jury.

B. Juries, Grand as Well as Petit, Must Be Impartially Drawn so as to Be Truly Representative of a Fair Cross-Section of the Community.

Many cases have established that juries, grand as well as petit, must be impartially drawn so as to be truly representative of a fair cross section of the community. Four cases are illustrative: *Ballard* v. *United States*, 329 U.S. 187 (1946); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946); *Glasser* v. *United States*, 315 U.S. 60 (1942); and *Smith* v. *United States*, 311 U.S. 128 (1940).

In *Ballard*, involving the systematic exclusion of women from jury service, the Court after quoting from federal statutory provisions, stated: "These provisions reflect a design to make the jury 'a cross-section of the community' and truly representative of it. *Glasser* v. *United States*, 315 U.S. 60, 86." 329 U.S. at 191.

In *Thiel*, involving the systematic exclusion of daily wage earners from jury panels, the Court held:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury

> drawn from a cross section of the community. *Smith* v. *Texas*, 311 U.S. 128, 130; *Glasser* v. *United States*, 315 U.S. 60, 85. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group of class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." 328 U.S. at 220.

Glasser involved a charge that there was a deliberate selection of women jurors from the membership of a particular private organization. The Court, in an opinion by Justice Murphy, in disapproving of this practice, said that the selection of jurors

> "must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community," and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will

> insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties." 315 U.S. at 85-86.

Smith v. *Texas*, 311 U.S. 128 (1940), involved the systematic exclusion of Negroes from grand jury service. The Court in an opinion by Mr. Justice Black held:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government. * * *" 311 U.S. at 130.

C. Accordingly, the Systematic Exclusion of Any Recognizable, Identifiable Group, Be It Racial, Ethnic, Sexual, Religious, Ethical, Economic, Social, Political, or Geographical, Within the Community from the Venires or Panels from Which Grand Juries Are Drawn Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Constitutional provisions proscribe the systematic exclusion of any recognizable identifiable group within the community from which juries are drawn. The most numerous cases are those involving the exclusion of Negroes from grand or petit juries, or both. See, *e.g.*, *Sims* v. *Georgia*,

389 U.S. 404 (1967) (grand and petit juries); *Jones* v. *Georgia*, 389 U.S. 24 (1967) (grand and petit juries); *Whitus* v. *Georgia*, 385 U.S. 545 (1967) (grand and petit juries); *Arnold* v. *North Carolina*, 376 U.S. 773 (1964) (grand juries); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958) (grand juries); *Smith* v. *Texas*, 311 U.S. 128 (1941) (grand juries); *Norris* v. *Alabama*, 294 U.S. 587 (1935) (grand juries); *Strauder* v. *West Virginia*, 100 U.S. 303 (1879) (grand and petit juries).

In *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958), Mr. Justice Black in the Court's opinion began with this sentence:

> "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race."

In footnote 1 he gave these cases:

> "1. *Strauder* v. *West Virginia*, 100 U.S. 303; *Neal* v. *Delaware*, 103 U.S. 370; *Gibson* v. *Mississippi*, 162 U.S. 565; *Carter* v. *Texas*, 177 U.S. 442; *Rogers* v. *Alabama*, 192 U.S. 226; *Martin* v. *Texas*, 200 U.S. 316; *Norris* v. *Alabama*, 294 U.S. 587; *Hale* v. *Kentucky*, 303 U.S. 613; *Pierre* v. *Louisiana*, 306 U.S. 354; *Smith* v. *Texas*, 311 U.S. 128; *Hill* v. *Texas*, 316 U.S. 400; *Akins* v. *Texas*, 325 U.S. 398; *Patton* v. *Mississippi*, 332 U.S. 463; *Cassell* v. *Texas*, 339 U.S. 282; *Hernandez* v. *Texas*, 347 U.S. 475; *Reece* v. *Georgia*, 350 U.S. 85."

356 U.S. at 585.

In *Whitus* v. *Georgia*, 385 U.S. 545, 549-50 (1967), the Court held and said:

> "For over fourscore years it has been federal statutory law, 18 Stat. 336 (1875), 18 U.S.C. §243, and the

law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); see also *Pierre* v. *Louisiana*, 306 U.S. 354 (1939)."

The exclusion of women from jury service was involved in *Ballard* v. *United States*, 329 U.S. 187 (1946), and *Glasser* v. *United States*, 315 U.S. 60 (1942). In *Ballard* in response to the argument that a group of males would be representative of a community even if women were not included, Mr. Justice Douglas in the Court's opinion answered:

"It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors *neither act* nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion

> of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." (329 U.S. at 193-94.)

In *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), the Court proscribed the exclusion of daily wage earners as a class. Indeed, the Court stated that the systematic exclusion of members of any of these groups was illegal: "* * * the economic, social, religious, racial, political and geographical groups of the community; * * *" (328 U.S. at 220.)

In *Hernandez* v. *Texas*, 347 U.S. 475 (1954), the Court invalidated the systematic exclusion of persons of Mexican descent from grand and petit juries.

In an early case, *Commonwealth of Kentucky* v. *Powers*, 139 Fed. 452 (C.C. E.D. Ky. 1905), the court held that the defendant was entitled

> "to have the jurors from which the jury is to be impaneled that is to try him selected from persons possessing the statutory qualifications, without discrimination against those of them who are members of the same political class as defendants because of their belonging to such class, and that it is a right secured to him by the equal protection of the laws clause of the fourteenth amendment." (139 Fed. at 462-63.)

Recently the Maryland Court of Appeals reversed the conviction of a Buddhist on the ground that he was denied equal protection by the state requirement that members of grand and petit juries demonstrate a belief in God. *Schowgurow* v. *State*, 240 Md. 121, 213 A.2d 475 (1965).

In *Juarez* v. *State*, 102 Tex. Cr. 297, 277 S.W. 1091 (1925), the Texas Court of Criminal Appeals ruled similarly on behalf of a Roman Catholic who objected that his indictment had been returned by a grand jury from which all Catholics had been systematically excluded by the jury commissioners.

A review of the authorities demonstrates that the systematic exclusion of any recognizable identifiable group within the community from which a jury venire is drawn violates the due process and equal protection clauses of the Fourteenth Amendment. If the case is a state case, and the jury is a petit jury, there is also a violation of the Sixth Amendment's provision for trial by an impartial jury, made fully applicable to the states by the due process clause of the Fourteenth Amendment.

D. Individuals With Scruples Against Capital Punishment Are a Recognizable, Identifiable Group Constituting Half of the Community, and This Group Is Growing.

Gallup polls conducted nationally in 1965 showed that 43% of the people were against capital punishment of defendants convicted of murder. In 1966 the figure rose to 47%. Roper polls conducted nationally in 1958 showed 50% against the death penalty. Harris polls conducted nationally in 1966 showed 47% against capital punishment. (*Reports* and *Releases* on file with: American Institute of Public Opinion, 53 Bank Street, Princeton, New Jersey; Roper Research Associates, Inc., 111 West 50th Street, New York, New York 10020; and Louis Harris & Associates, Inc., One Rockefeller Plaza, New York, New York.) (At the hearing on the instant petition we shall produce

witnesses who will testify that at the relevant time, more than half of the people in New York County were against capital punishment.) On November 3, 1964, the People of the State of Oregon at a general election voted to abolish capital punishment by 455,654 to 302,105, or more than 60%. Ore. Laws 6 (1965).

The Court took note of some of these polls in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). Mr. Justice Stewart in the Court's opinion, with a reference to polls, pointed out that scrupled jurors were on the increase: "Yet, in a nation less than half of whose people believe in the death penalty,[16] a jury composed exclusively of such people cannot speak for the community." 391 U.S. at 519-20: In footnote 16 he added:

> "It appears that, in 1966, approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. Polls, International Review on Public Opinion, Vol. 11, No. 3 at p. 84 (1967). In 1960, the comparable figures were 51% in favor, 36% opposed, and 13% undecided." *Ibid.*

Reference may further be made to this paragraph from Mr. Chief Justice Warren's opinion for a unanimous Court in *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954), where he pointed out that other differences than those in race and color were to be given consideration in determining whether there had been an unconstitutional exclusion:

> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prej-

udices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a 'two class theory' — that is, based upon differences between 'white and Negro.'"

E. Where There Has Been Systematic Exclusion of Any Recognizable Identifiable Group Within the Community from Which Juries Are Drawn, There Are Constitutional Violations Without Any Showing of Prejudice in an Individual Case.

The trial court, with its misplaced reliance on *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), felt that the petitioner in order to prevail had the burden of showing that the exclusion of scrupled jurors resulted in petit juries which were prosecution prone on the issue of guilt (61 Misc. 2d at 829-30, 306 N.Y.S. 2d at 793-94, App. II at 7a-8a). To begin with, the lower court's assumption could not apply to grand juries at all, for they do not decide the issue of guilt. In the second place, although counsel for petitioner is of the opinion that the exclusion of scrupled jurors results in petit juries which are prosecution prone, the petitioner has no burden to show this in a systematic exclusion case.

In a systematic exclusion case, there is no need to make any specific showing of prejudice. A number of the cases which we have already cited have so held. As the Court

put it in *Ballard* v. *United States*, 329 U.S. 187, 195 (1946): "But reversible error does not depend on a showing of prejudice in an individual case."

F. The Petitioner Is Entitled to a Hearing at Which He Will Seek to Show That Section 597 of the New York Judiciary Law, as Applied by the County Clerk of New York County, Resulted in the Systematic Exclusion of Scrupled Individuals from the Venires or Panels from Which Grand as Well as Petit Jurors Were Taken.

Section 597 of the New York Judiciary Law, as applied by the County Clerk of New York County, resulted in the systematic exclusion of scrupled individuals from the venires or panels from which grand as well as petit juries were taken. This was done by means of an astutely worded double-barrelled question which asked the individual both whether he has scruples and whether they would prevent him from finding a defendant guilty in a capital case. Our investigation shows that prospective jurors did not detect the double-barrelled nature of this question. Those who were opposed to capital punishment simply answered in the affirmative. Moreover, at the requested hearing we shall offer testimony to show that all those who answered in the affirmative were automatically exeluded from the venires or panels from which grand as well as petit jurors were taken. Trial counsel were thus denied any opportunity to question those individuals as to the nature and nuances of their belief and their ability or likelihood in certain cases of putting aside their scruples. Such individuals were simply and automatically excluded.

In addition, in the case of grand jurors, there was no justification whatever for such disqualification because grand jurors determine other than capital cases. Even in capital cases they do not decide such issues as guilt or punishment.

Examining the nature and nuances of the beliefs of scrupled jurors, and the possibility of such individuals putting aside their scruples, cannot be done by a jury clerk during the two-minute double-barrelled qualification process. In fact, it cannot be done at all on a wholesale basis pretrial. Moreover, there were never any further questions to scrupled individuals. They were simply disqualified automatically.

In short, jurors should not be disqualified pretrial in wholesale lots because they stated on qualifying that they had "such views concerning the death penalty as would prevent" them from finding a defendant guilty. Like any other bias, such a bias should have been explored only on the trial voir dire. The issue is not how lawyers and judges would understand the question in the *Form of Questionnaire* of Rule 17, but rather how scrupled individuals filling out the questionnaire understood the question. As Mr. Justice Stewart stated in footnote 9 of the Court's opinion in *Witherspoon* v. *Illinois*, 391 U.S. 510, 516 n.9 (1968), after a reference to the voir dire examination of jurors:

> "* * * See generally Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Tex. L. Rev. 545, 547-548 (1961); Comment, 1968 Duke L.J. 283, 295-299.

> The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood or misunderstood by prospective jurors. Any 'layman * * * [might] say he has scruples if he is somewhat unhappy about death sentences. * * * [Thus] a general question as to the presence of * * * reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direct cases.' Id., at 308-309. Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."

In the more recent case of *Boulden* v. *Holman*, 394 U.S. 478 (1969), the Court reversed a state court conviction and remanded because some veniremen were excluded simply because of their statements that they did not believe in capital punishment. Mr. Justice Stewart in the Court's opinion wrote:

> "* * * Two other veniremen seem to have been excluded merely by virtue of their statements that they did not 'believe in' capital punishment.[7] Yet it is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." (394 U.S. at 483-84.)

In footnote 7 he had these two sentences.

> "* * * two veniremen were excused when they merely responded affirmatively to the disjunctively phrased

question whether they had 'a fixed opinion against capital or penitentiary punishment.' It is thus not possible to discern from the record which type of punishment they objected to, although the more likely assumption would be that it was capital punishment. * * *" *Ibid.*

Further relevant material may be found in footnotes 7 and 8 to the Court's opinion in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). In these footnotes Mr. Justice Stewart wrote for the Court:

"7. It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State. See Commonwealth v. Webster, 59 Mass. 295, 298. See also Atkins v. State, 16 Ark. 568, 580; Williams v. State, 32 Miss. 389, 395-396; Rhea v. State, 63 Neb. 461, 472-473, 88 N.W. 789, 792.

"8. Compare Smith v. State, 55 Miss. 410, 413-414: 'The declaration of the rejected jurors, in this case, amounted only to a statement that they would not like * * * a man to be hung. Few men would. Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man. * * * For the error in improperly rejecting [these] two members of the special *venire* the case must be reversed.'" (391 U.S. at 514-15.)

While we believe that under the Court's decisions, the petitioner is entitled to his release now on habeas corpus, in any event and at the very least, he is entitled to a hearing at which he will bring in the County Clerk of New

York County and those under him who work with him in applying section 597 of the New York Judiciary Law, and Rules 2 and 17 of the Rules of the Jury System in the City of New York, together with the questionnaires filled out by prospective jurors, as well as their index cards and index books, to show how the systematic exclusion of scrupled jurors from the venires or panels from which grand as well as petit juries were taken, occurred.

But the lower court, misunderstanding as well as misapplying *Witherspoon*, equated the petitioner's proposed offer of live testimony, subject to cross examination, to establish a systematic exclusion case, with the academic surveys in *Witherspoon*, a case involving a petit jury which was not properly death-qualified but which nevertheless imposed a death penalty. The two situations are not comparable.

The state has no constitutional right, nor any recognizable, legitimate interest in excluding scrupled jurors from the venires or panels from which grand juries are taken. On the other hand, the petitioner does have a constitutional right against the systematic exclusion of scrupled jurors, who constitute a recognizable, identifiable group within the community from the venires or panels from which the grand jury that indicted him was taken.

II

New York Judiciary Law Section 597, which, as applied by the County Clerk of New York County, resulted in the automatic, total and systematic exclusion of scrupled individuals from the venires or panels from which the petit jury which convicted petitioner was taken, violated the due process and equal protection clauses of the Fourteenth Amendment, as well as the Sixth Amendment's requirement for trial by an impartial jury, made fully applicable to the states by the due process clause of the Fourteenth Amendment.

A. The Sixth Amendment Requirement for Trial by an Impartial Jury Has Been Made Fully Applicable to the States by the Due Process Clause of the Fourteenth Amendment.

It is now clear that the Sixth Amendment guarantee of the right to trial by jury has been made fully applicable to the states by the due process clause of the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Baldwin* v. *New York*, 399 U.S. 66 (1970). In *Duncan* the appellant was convicted of a simple battery, a misdemeanor; and received a sentence of 60 days and a fine of $150.00. However, his sentence could have been as much as two years. The Court held that he was entitled to a jury trial, saying through Mr. Justice White:

> "• • • Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. • • • (391 U.S. at 149.)

The process of making the specifics of the Sixth Amendment fully applicable to the states began with *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and *Pointer* v. *Texas*, 380 U.S. 400 (1965), where the Court made the Sixth Amendment's rights to counsel and to confrontation as fully applicable to the states as to the federal government. *Gideon* v. *Wainwright*, like *Mapp* v. *Ohio*, 367 U.S. 643 (1961), wrought a great change, and, like *Mapp*, overruled an earlier and much cited case, *Betts* v. *Brady*, 316 U.S. 455 (1942), which had confined the Fourteenth Amendment's due process right to counsel in state noncapital cases to those instances where the surrounding circumstances demonstrated that the accused could not adequately present his own defense.

Accordingly, the systematic exclusion of any recognizable, identifiable group, be it racial, ethnic, sexual, religious, ethical, economic, social, political, or geographical, within the community from which state juries are drawn, violates the Sixth Amendment's requirement for trial by an impartial jury. Women constitute such a group. Daily wage earners constitute such a group. And individuals with scruples against capital punishment constitute such a group. Moreover, the last group comprises half of the community and it is growing.

As both Mr. Justice Stewart in the Court's opinion in *Witherspoon* v. *Illinois*, 391 U.S. 510, 518 (1968) and Mr. Justice Douglas in his concurring opinion (391 U.S. at 524 n. 1), recognized in citing *Glasser* v. *United States*, 315 U.S. 60, 84-86 (1942), the Sixth Amendment's provision for trial by an impartial jury, made fully applicable to the states by the due process clause of the Fourteenth Amendment,

requires a panel which fairly represents "a cross-section of the community." (315 U.S. at 86).

Even Mr. Justice White in his dissenting opinion in *Witherspoon* recognized that jury panels from which jurors who determined guilt or innocence are chosen, must represent a fair cross section of the community, when he commented in his first footnote:

> "While I agree generally with the opinion of Mr. Justice Black, and so have joined it, I would not wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt" (391 U.S. at 541, n. 1).

Thus on the basis of the authorities cited in the preceding point, as well as in this section, it is clear that section 597 of the New York Judiciary Law, as applied by the County Clerk in New York County, resulting as it did in the systematic excluding of scrupled jurors, violated, so far as the petit jury which convicted petitioner was concerned the due process and the equal protection clauses of the Fourteenth Amendment, as well as the Sixth Amendment requirement for trial by an impartial jury, made fully applicable to the states by the due process clause of the Fourteenth Amendment.

B. New York's Blue Ribbon Jury Statute, Under Which Petitioner Was Tried on the Motion of the Prosecution and Over His Objection, Compounded the Constitutional Errors Involved in the Exclusion of Scrupled Jurors by Further Discrimination Against Blue Collar Workers and Women.

New York's blue ribbon jury system resulted in panels which not only severely discriminated against lower economic groups and women, but also totally discriminated against scrupled individuals. Indeed, the object of this statute was to effect the exclusion from the blue ribbon jury panels of all those individuals who had conscientious scruples against capital punishment, see *People* v. *Hall*, 169 N.Y. 184, 196 (1901); *People* v. *Blanchfield*, 45 Misc. 2d 536, 538-39, 257 N.Y.S. 2d 438, 441-2 (Sup. Ct. N.Y. County 1965); and the statute as applied accomplished this summarily without any questioning of scrupled individuals as to the nature or nuances of their beliefs or their ability or likelihood in certain cases of putting aside their scruples.

There were 400 persons on the special jury panels (250 on the original panel and 150 on the additional panel) from which the special jury was drawn; and it is obvious from an inspection of the lists that the panels were exceptionally top-heavy with professional and executive people, that they contained very sparse representation of ordinary workingmen or daily wage earners—particularly, "blue collar" workers, and that they contained only 11 women out of the 400 persons.

Indeed, everybody in New York but the courts recognized that blue ribbon juries were not impartial. Everybody but the courts knew that blue ribbon juries were hand-

picked by a special system which discriminated against laborers and other members of the lower economic classes. Everybody knew that blue ribbon juries did not represent a cross section of the community. Everybody knew that the blue ribbon jury system assured the state of juries whose members were partial to the prosecution on the issue of guilt or innocence.

Prosecutors knew; for in the ten-year period from 1941 to 1950 they alone requested every special jury that was impaneled, save one. *New York Judicial Council Report* 164 (1952).

Counsel for defendants knew; for in this ten-year period, with but this single exception, they never requested a blue ribbon jury. *Ibid.*

The New York Judicial Council knew; for it repeatedly requested the repeal of New York's blue ribbon jury statute. *Id.* at pp. 58-59, 157-159.

The Committee on Criminal Courts of the Association of the Bar of the City of New York knew; for it favored the abolition of blue ribbon juries. *Report of the Committee on Criminal Courts*, April 26, 1965.

The New York courts themselves began to recognize the defects of the blue ribbon jury system when Mr. Justice Abraham N. Geller in *People* v. *Blanchfield*, 45 Misc. 2d 536, 541, 257 N.Y.S. 2d 438, 443 (Sup. Ct. N.Y. County 1965), although granting a motion for a special jury, in effect declared invalid the existing selection machinery when he suggested at the end of his opinion that former

section 749-aa was "susceptible of an interpretation whereby the available special jurors would be drawn from all the jurors qualified to serve as trial jurors who are not found to be ineligible under the statutory tests."

Senator Jeremiah B. Bloom, the sponsor of the legislation which abolished New York's blue ribbon jury system, knew; for in his memorandum in support of this legislation he stated, referring to New York's blue ribbon statute: "If its constitutionality was to be tested at this time the article would most probably be found to be violative of the right of citizens to equal protection under the law, as guaranteed by the Fourteenth Amendment". *New York State Legislative Annual* 34 (1965).

The New York legislative itself knew; for in 1965 it finally abolished New York's blue ribbon jury system. This historical background clearly demonstrates the unconstitutionality of former section 749-aa, as applied.

The exclusive nature of New York's blue ribbon jury system explains why blue ribbon juries convicted in a substantially greater percentage of cases than general juries. For example, a study for the defense in *Moore* v. *New York*, 333 U.S. 565, 567 (1948), showed that in the ten-year period from July 1, 1937 to June 30, 1946, special juries in Bronx County "convicted in 79% of the cases while the general juries convicted in 57%".

The Court in *Fay* v. *New York*, 332 U.S. 261 (1947), was sensitive to the problem:

> "But a ratio of conviction so disparate, if it continued until 1945, might, in absence of explanation, be taken

to indicate that the special jury was, in contrast to its alternate, organized to convict. A defendant could complain of this inequality even if it were shown that a special jury court never had convicted any defendant who did not deserve conviction." (332 U.S. at 286.)

However, the Court was reluctant to throw the statute out because it felt that there was insufficient evidence to show intentional exclusion. But in *Whitus* v. *Georgia*, 385 U.S. 545 (1967), *Jones* v. *Georgia*, 389 U.S. 24 (1967), and *Sims* v. *Georgia*, 389 U.S. 404 (1967), the Court held that the defense did not have to show intentional exclusion. It was sufficient to show that a fair cross-section was lacking. The Mark Fein blue ribbon jury did not represent a fair cross-section.

In *Whitus*, the Court vacated the judgment of conviction when it was shown that Negroes constituted 27.1% of the tax rolls, but only 9.3% of the grand jury venire and 7.8% of the petit jury venire. The Court held that the State was required to explain this discrepancy. In *Jones*, the Court held that the burden was on the State to explain the disparity between the percentage of Negroes on the tax digest and those on the venires. The Supreme Court based its decision on the fact that the tax rolls showed 20% Negroes, and only 5% of the jury list was Negro. It did not require the defendant to show any intent to discriminate.

The fact that New York has now abolished the blue ribbon jury system does not render the question presented by this petition any less substantial. The long-overdue legislative reform finally enacted in New York is of no

avail to the petitioner, who has been sentenced to serve thirty years to life imprisonment after being tried under this unconstitutional jury statute.

C. In Any Event, Pursuant to the Court's Holdings, the Petitioner Is Entitled at the Very Least to a Hearing in Which He Will Establish Not Only the Unconstitutional Operation of Section 597 of the New York Judiciary Law, but also the Unconstitutional Operation of New York's Blue Ribbon Jury Statute in New York County.

Petitioner in any event is entitled to a hearing at which he will show not only the unconstitutional operation of Section 597 of the New York Judiciary Law, but also of New York's blue ribbon jury statute in New York County. He will make a record on the operation of these two statutes in New York County. He will establish not only that there was a systematic exclusion of scrupled jurors from the venires or panels from which grand as well as petit jurors were taken, but also that under New York's blue ribbon jury statute there was further discrimination against blue collar workers and women. Petitioner will show not only the systematic exclusion of scrupled jurors but also, more specifically, that of the 400 persons who were on the special jury panels from which the special jury which convicted petitioner was drawn, there was very few blue collar workers and only 11 women. Such a record will show that *Fay* v. *New York*, 332 U.S. 261 (1947), and *Moore* v. *New York*, 333 U.S. 565 (1948), upon which the trial court relied, are no longer applicable to the instant case.

The petitioner by live testimony, subject to cross-examination, will demonstrate, as is his constitutional right,

that section 597 as applied in New York County resulted in the automatic exclusion of all scrupled individuals without any questioning, or the opportunity for it, as to the nature or nuances of their beliefs or their ability or likelihood in certain cases of putting aside their scruples. The petitioner's proof will show that such individuals were excluded from the venires or panels from which grand as well as petit jurors were taken. Trial counsel were thus denied any opportunity to question them. Such individuals were simply and automatically excluded.

The petitioner's proof will answer the "critical question" left unanswered in *Witherspoon*, where Mr. Justice Stewart wrote in the Court's opinion:

> "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors. Any 'layman * * * [might] say he has scruples if he is somewhat unhappy about death sentences. * * * [Thus] a general question as to the presence of * * * reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direct cases.' (Id., at 308-309). Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." (391 U.S. at 516 n. 9).

The petitioner's proof will make clear what was left in doubt in *Boulden* v. *Holman*, 394 U.S. 478 (1969), where Mr. Justice Stewart in the Court's opinion stated:

> "* * * Two other veniremen seem to have been excluded merely by virtue of their statement that they

did not 'believe in' capital punishment. Yet it is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." (394 U.S. at 483-84).

The petitioner's proof will establish that section 597 as applied in New York County resulted in grand as well as petit jurors which "* * * fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." *Witherspoon* v. *Illinois*, 391 U.S. 490, 518 (1968). Yet the lower court, misunderstanding *Witherspoon*, characterized the petitioner's proffered proof with the misused phrase, "a fishing expedition" (61 Misc. 2d at 830, 306 N.Y.S. 2d at 793, App. II at 8a). On the contrary, the petitioner knows exactly what his proof will show, and that it will demonstrate a systematic exclusion case.

Furthermore, the petitioner's primary point in the instant case is that section 597 as applied in New York County resulted in the systematic, total and automatic exclusion of all scrupled individuals from grand juries. Here there was certainly no justification whatever for such death qualification because grand jurors determine other than capital cases. Even in capital cases they do not decide such issues as guilt or innocence or punishment.

III

The trial judge's voir dire of the jury in the jury room near the end of the trial, without the petitioner's personal presence, violated the due process clause of the Fourteenth Amendment.

The petitioner's trial lasted from Monday, October 19, 1964 until Wednesday, November 25, 1964. Near the close of the trial and on November 18, 1964, Jimmy Breslin had a lengthy article in the New York Herald Tribune, in which he categorically stated that the petitioner was guilty, made fun of his conduct as well as that of his wife in the courtroom, characterized his father as a millionaire, and gave a maudlin account of some of the next of kin of the decedent with a view to creating added sympathy for them. The trial judge conducted a voir dire of the jury in the jury room about the Breslin article, but petitioner was not present. He was not asked to be present. He was not even aware of this part of the trial. He was in custody. But under the due process clause of the Fourteenth Amendment, he was entitled to be personally present.

The petitioner's exclusion from this part of the trial was aggravated by the fact that at the beginning of the trial the trial judge remanded him, although he had been out on bail theretofore, and there was no basis for the remand. Thus the petitioner could not keep fully abreast of what was happening, including the appearance of the Breslin article.

In the federal courts the cases have long held that a defendant in a felony case must be personally present

throughout the trial. For example, in *Lewis* v. *United States*, 146 U.S. 370 (1892), the Court held and said:

> "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. 'It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence.' *Prine* v. *The Commonwealth*, 18 Penn. St. 103, 104, per Gibson, C.J. And it appears to be well settled that, where the personal presence is necessary in a point of law, the record must show the fact. Thus, in a Virginia case, *Hoober* v. *The Commonwealth*, 13 Grat. 763, 765, the court observed that the record showed that, on two occasions during the trial, the prisoner appeared by attorney, and that there was nothing to show that he was personally present in court on either day, and added, 'This is probably the result of mere inadvertence in making up the record, yet this court must look only to the record as it is. * * * It is the right of any one, when prosecuted on a capital or criminal charge, "to be confronted with the accusers and witnesses," and it is within the scope of his right that he be present, not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected.' Thereupon the judgment was reversed. And in the case of *Dunn* v. *Commonwealth*, 6 Penn. St. 384, it was held that the record in a capital case must show affirmatively the prisoner's presence in court, and that it was not allowable to in-

dulge the presumption that everything was rightly done until the contrary appears. *Ball* v. *United States*, 140 U.S. 118 is to the same effect." (146 U.S. at 372-73.)

In the earlier case of *Hopt* v. *Utah*, 110 U.S. 574 (1884), the Court held that in Utah the trial of challenges of proposed jurors in felony cases had to be in the presence of the accused, saying:

> "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' (1 Bl. Com. 133). The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. * * *" (110 U.S. at 579.)

Rule 43 of the Federal Rules of Criminal Procedure requiring that the defendant shall be present at every stage of the trial is but a restatement of the existing law. For a case after the adoption of the new rules see *United States* v.

Neal, 320 F.2d 533 (3d Cir. 1963). In that case after the jury had returned its verdict of guilty, this colloquy occurred between the foreman of the jury and the court out of the presence of the defendant:

> "'May we recommend leniency?'
>
> The trial judge replied:
>
> "The Court will accept the recommendation of mercy. *As I said to you*, however, the Court must in cases like this feel free to disregard it if it desires." (Emphasis supplied.)
>
> The foreman then said:
>
> 'We realize that.'" (320 F.2d at 535.)

Since the defendant was not present when this occurred, the Third Circuit held there was error requiring a reversal of the conviction.

Nor did the presence of petitioner's counsel in the jury room when the trial judge conducted his perfunctory voir dire of the jurors about the offending Breslin article constitute a waiver of the petitioner's constitutional right to be there. In this area a waiver must be an intentional relinquishment of a known right. A case in point is *Evans v. United States*, 284 F.2d 393 (6th Cir. 1960). In that case the judge gave the jury an instruction with counsel's presence but in the absence of the defendant. Thereafter the court repeated the instruction not only in the presence of counsel, but also of the defendant. The Sixth Circuit held that this was not sufficient, saying:

> "The Government urges that defendant waived his right to be present in court when the instructions were given because defendant's counsel, in his presence, later stated to the court that he was satisfied with what had been done. It may be questioned whether this

amounted to a waiver of what had previously happened. The defendant did not know of the jury's request for additional instructions until after the court had instructed the jury in his absence. The record does not show that defendant knew or was advised of his rights. In order to constitute a waiver, there must be a voluntary relinquishment of a *known* right. Johnson v. Zerbst, 1937, 304 U. S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461. In our judgment, the error was not cured by the Court Reporter later reading the instructions to the jury in the presence of the defendant. * * *" (284 F.2d at 395.)

So in the instant case, there was and could have been no waiver. The petitioner was in custody. Although he had been out on bail, the trial judge at the outset of the trial and without any reason for it, remanded him. Thus he was greatly handicapped in access to his counsel. In addition, he could not keep abreast of events, such as the Breslin article. The trial judge's perfunctory voir dire of the jurors in the jury room about the Breslin article, acquiesced in by the petitioner's counsel, was greatly to the petitioner's detriment. Had he been consulted, he would have wanted to be present. Had petitioner been present, he would have urged upon his counsel further questions: for one of the jurors admitted that he had seen the offensive and offending Breslin article but added that he had not read it. The trial judge's conduct in questioning the jurors in the jury room violated the petitioner's constitutional rights.

Nevertheless, Justice Grady sought to distinguish *Evans* v. *United States*, 284 F. 2d 393 (6th Cir., 1960); and held: "The questioning of the jury was not a material part of the trial" (61 Misc. 2d at 833, 306 N.Y.S. 2d at 796, App. II at 14a). But the trial court read *Evans* too nar-

rowly. If the additional instructions to the jury were part of the trial in *Evans*, then the trial judge's voir dire of the jury about the Breslin article was part of the trial in the instant case. Nor did the presence of petitioner's counsel during the voir dire constitute a waiver of the petitioner's constitutional rights.

Conclusion

The petitioner's sentence is illegal. The Court should accordingly grant the instant petition for a writ of certiorari, reverse the judgment of the court below, and order the petitioner discharged from custody.

At the very least, and in any event, petitioner is entitled to a hearing in which he will establish that under section 507 and former section 708-a of the New York Judiciary Law, there was not only the systematic exclusion of eligible jurors from the venires or panels from which grand as well as petit jurors were taken, but also that under New York's blue ribbon jury statute there was further discrimination against blue collar workers and women. At the very least, and in any event, the Court should grant the instant petition for a writ of certiorari, reverse the judgment of the court below, and remand the case for a trial of the allegations of the petition.

Respectfully submitted,

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Attorneys for Petitioner

APPENDICES

Appendix I

Opinion

34 A.D.2d 835, 312 N.Y.S.2d 531

SUPREME COURT

APPELLATE DIVISION — SECOND DEPARTMENT

May 25, 1970

Dutchess County Clerk's Index No. 143/70

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. MARK FEIN,

Appellant,

v.

HAROLD W. FOLLETTE, Warden, Green Haven Prison,

Respondent.

Before:

CHRIST, P. J., and RABIN, HOPKINS, MUNDER and BRENNAN, JJ.

In a habeas corpus proceeding, petitioner appeals from a judgment of the Supreme Court, Dutchess County, dated February 16, 1970, which dismissed the writ.

Judgment affirmed, without costs.

Under an indictment charging murder in the first degree, relator was found guilty of murder in the second de-

give and was sentenced to a prison term of 30 years to life. Since he was not found guilty of murder in the first degree and was not sentenced to death, the principles of law enunciated in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 and the fact that there was a statute (Judiciary Law, §397) under which jurors with scruples against the death penalty could be excluded, are of no avail to relator (Witherspoon v. Illinois, supra, n. 21 [pp. 522-523, 88 S.Ct. 1779]; Bumper v. North Carolina, 391 U.S. 543, 545, 88 S.Ct. 1788, 20 L.Ed.2d 797; People v. DiPiazza, 24 N.Y. 2d 342, 354, 300 N.Y.S.2d 545, 556, 248 N.E.2d 412, 419; People ex rel. McChesney v. La Vallee, 31 A.D.2d 1, 4, 294 N.Y.S.2d 398, 601). We have considered the other points raised by relator and find them to be without merit.

Appendix B
Opinion

61 Misc. 2d 826, 306 N.Y.S. 2d 789.

SUPREME COURT

Dutchess County

January 19, 1970

Dutchess County Clerk's Index No. 143/70.

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. MARK PEIX,

Relator,

v.

HAROLD W. FOLLETTE, Warden, Green Haven Prison,

Respondent.

GRADY, J.

This writ of habeas corpus raises two issues concerning the illegality of relator's sentence of thirty (30) years to life imposed by Mr. Justice Culkin for Murder in the Second Degree after a jury trial in the Supreme Court, New York County.

Appendix II

I

Did New York Judiciary Law 597 as applied in New York County violate the due process and equal protection clauses of the Fourteenth Amendment and the right to trial by an impartial jury under the Sixth Amendment by systematically excluding from grand and petit juries individuals who had conscientious scruples against capital punishment?

This issue was raised by Relator for the first time before the 2nd Circuit Court of Appeals which stated:

> "In his reply brief, Fein for the first time also argues that the blue ribbon statute was unconstitutional on its face because its object was
>
> > '* * * to effect the exclusion * * * of all those individuals who had conscientious scruples against capital punishment. * * * Thus this statute assured the state of a jury whose members were partial to the prosecutor on the issue of guilt or innocence.'
>
> "This argument in Fein's reply brief came after (and no doubt in light of) the grant of certiorari by the Supreme Court in *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). In that case the Court held unconstitutional the imposition of the death penalty in cases where persons with scruples against capital punishment were excluded from jury service, a holding explicitly limited to death penalty cases and then only to sentence rather than conviction. *Id.* at 522-523, 88 S. Ct. 1770 n. 21; see *Bumper* v. *North Carolina*, 391 U. S. 543, 545, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968). The Court in *Witherspoon* did consider the argument that exclusion of jurors with scruples against capital punishment precludes an impartial trial

on the issue of guilt. The majority there said *id.* at 517-518, 88 S. Ct. at 1774:

> 'We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.'

"While it is true that *Witherspoon* does hint, as the dissenters note, *id.* at 539, 88 S. Ct. 1770 that the law may change on a different record, the studies and reports cited to us are the same as those cited in the Court in *Witherspoon* and *Bumper*. Thus, a different result could not be supported on the present law. However, we do not even reach the question. As pointed out above, this part of the challenge to the blue ribbon jury statute was first made in this court. Consequently, there was not only no opportunity for the district court to evaluate the question, but Fein apparently has not exhausted his State Court remedies by first making the argument raised here to the New York State courts. In these circumstances, we should refuse to pass on the claim without prejudice to Fein's subsequently making it to the State Courts."

(*U. S. ex rel. Fein* v. *Deegan*, 410 F. 2d 13 at pp. 22-23.)

The constitutionality of New York Judiciary section 597, as applied in New York County, is properly before this court for determination in view of the directive from the 2nd Circuit Court of Appeals. However, that court did dispose in its opinion of a point raised by the Relator on this writ which is connected with his attack on the constitutionality of Judiciary Law section 597. Fein claims that

the New York blue ribbon jury statute (former Judiciary Law section 749-aa) under which he was tried over his objection, compounded the constitutional errors involved in the exclusion of scrupled jurors by further discrimination against blue collar workers and women. The court held it was bound by the decisions in *Moore v. New York*, 333 U.S. 565 and *Fay v. New York*, 332 U.S. 261, and that the New York blue ribbon jury statute was constitutional (*Id.* at 22).

Section 397 of the Judiciary Law in effect at the time of Fain's conviction provided:

> "No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, of any crime punishable by death. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above."

The New York County Clerk provided a questionnaire form for prospective jurors which contained the following question:

> "Have you such views concerning the death penalty as would prevent you from finding a defendant guilty if the crime charged be punishable by death."

It appears that a *yes* answer resulted in an automatic disqualification of the prospective juror.

Appendix II

Fein, seizing upon the language in the opinion of the 2nd Circuit Court of Appeals with respect to the *Witherspoon* and *Bumper* cases, urges this court to grant a hearing at which Fein will establish the unconstitutional operation of section 597 of the New York Judiciary Law in New York County. Both *Witherspoon* and *Bumper* while holding that the exclusion of jurors with scruples against capital punishment did not require a reversal of the convictions, left open the possibility that a record could be made which would show that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.

Fein's burden in making such a record would be to show that section 597 of the Judiciary Law was misapplied in New York County in 1964 so as to exclude from the grand and petit juries individuals who were opposed to capital punishment but whose views would not prevent them from rendering a verdict of guilty in a capital case. To meet this burden, Fein states that he does not rely on studies, reports and polls, but proposes to produce at a hearing, if one is permitted by this court, the County Clerk of New York County, his records pertaining to the application of section 597 of the New York Judiciary Law and Rules 2 and 17 of the Jury System of the City of New York and jurors from the 1964 New York County Special Jury panels from which the Fein special jury was drawn. In *Witherspoon* (id. at 517, note 10) the Supreme Court was presented with "a study based upon interviews with 1248 jurors in New York and Chicago" which found that juries from which those opposed to capital punishment were sum-

marily excluded, were prosecution prone. The court held that this study was insufficient to prove that exclusion resulted in an unrepresentative jury on the issue of guilt. Fein seeks to question at a hearing jurors on the 1964 Special Jury Panel as to their views in 1964 towards capital punishment. The testimony of such jurors would carry no greater weight than the study based upon interviews with jurors which was rejected in *Witherspoon*. The examination of the records of the New York County Clerk would be in the nature of a fishing expedition to prove Fein's hypothesis and should not be permitted.

Fein alleges that the grand jury which indicted him and the special jury which convicted him were prosecution prone because those prospective jurors opposed to capital punishment were summarily excluded. This argument has been rejected in *Fay* v. *New York*, supra and *Moore* v. *New York*, supra. The use of a special jury (Judiciary Law, former section 749-aa, repealed by L. 1965, Ch. 778) did not violate Fein's rights to a fair trial, to due process or to equal protection of the laws (*People* v. *Jackson*, 20 N.Y. 2d 440, 456, cert. den., 391 U.S. 928; *People* v. *Donohue*, 20 N.Y. 2d 824).

While Fein now attacks the constitutionality of section 597 of the Judiciary Law, at no time prior to judgment did he object to the composition of the grand or special juries with respect to the exclusion of individuals opposed to capital punishment. Even before the commencement of Fein's trial, his trial counsel, in opposing the District Attorney's request for a special jury, made clear that on Fein's behalf he would question the assembled panel of

jurors as to conscientious scruples against capital punishment. It appears that during the selection of the special jury, Fein never registered any objection to the exclusion, without further inquiry, of jurors who opposed capital punishment as to whether their beliefs would prevent them from rendering a fair verdict. Such objection could have been raised (Code of Criminal Procedure Section 377 (8); *People* v. *Fernandez*, 301 N.Y. 302). Fein's trial counsel could have made a challenge to the panel concerning the systematic exclusion issue resulting in an unrepresentative jury pursuant to section 363 of the Code of Criminal Procedure. Upon such challenge, the court could have tried the sufficiency of the challenge (Code of Criminal Procedure Section 364) and upon a trial of the challenge, persons could have been examined to prove or disprove the facts alleged as the ground of the challenge (Code of Criminal Procedure Section 367). Now more than four years after his conviction, Fein seeks to prove that the exclusion of scrupled jurors resulted in an unrepresentative jury.

However, other than the studies, reports and polls submitted by Fein herein which were held insufficient in *Witherspoon* and *Bumper*, no showing has been made to support the misapplication of section 597, Judiciary Law, by the County Clerk which requires a hearing. Moreover, Fein's constitutional rights were not violated by the application of this section (*People ex rel. McChesney* v. *LaVallee*, 31 A.D. 2d 1, 294 N.Y.S. 2d 598, appeal denied 23 N.Y. 2d 644, cert. den. 395 U. S. 970).

In *People* v. *DiPiazza*, 24 N.Y. 2d 342, an attack was made as to the constitutionality of section 663 of the Judi-

ciary Law which contains practically the same language as section 597 of the Judiciary Law. The Court of Appeals held:

> "There is no merit to this argument. In the first place, no problem arises with such a statute where, as here, the defendant receives a sentence of life imprisonment (see e.g. *Bumper* v. *North Carolina*, 391 U.S. 543 545). In the second place, the type of statute which the Supreme Court condemned in *Witherspoon* v. *Illinois* (391 U. S. 510) is one which would permit exclusion of a juror with conscientious scruples without regard to whether such scruples would prevent him from rendering a fair verdict on the question of guilt. Since the New York statute does not operate unless the conscientious scruples would prevent the rendition of a fair verdict, it is preserved from the unconstitutionality asserted by the defendant. (See e.g. *Witherspoon* v. *Illinois*, 391 U. S. 510; supra; *Crawford* v. *Bounds*, 395 F. 2d 297). More specifically, as the court indicated in Witherspoon, legislation would be stamped as invalid only if it allowed for a jury which falls 'short of that impartiality to which (a defendant) was entitled under the Sixth and Fourteenth Amendments' (391 U. S. at p. 519)." (24 N.Y.2d at 354.)

The operation of section 597 of the New York Judiciary Law, as applied in New York County, did not prevent the rendition of a fair verdict on the issue of Fein's guilt and did not substantially increase the risk of Fein's conviction.

II

Did the trial judge's voir dire of the jury during the trial, without petitioner's personal presence, violate New York Code of Criminal Procedure sections 356

and 427 and the due process clause of the Fourteenth Amendment?

On November 18, 1964, towards the end of Fein's trial, Fein's trial counsel brought to the court's attention a newspaper article concerning the trial that appeared in the NEW YORK HERALD TRIBUNE under the by line of Jimmy Breslin. Upon the consent of Fein's attorney and the prosecutor, the court ordered the jury to retire to the jury room so that the court could ask the jurors if they had seen the article. The following colloquy took place between the court and the Fein jury in the absence of Fein but in the presence of Fein's attorney and the prosecutor:

"The Court: It has been called to the Court's attention that an article has appeared this morning on the first page of the second section of the Tribune. The whole column was in reference to this case. Have any of you gentlemen seen it?

A Juror: I saw it.

The Court: Did you read it?

A Juror: I saw it but I didn't read it.

The Court: I cannot admonish you more strongly than I am at the present time, and I have advised you time and time again not to look at or read anything pertaining to this case. Now if you do so, gentlemen, you do so under penalty of a penal imprisonment. You have already been told that. Otherwise the whole case would have to be set aside and retried.

I tell you not to look at any papers or have anyone call anything to your attention concerning this case, or anything that may be written by anyone any place, at any time.

Appendix II

Now is that definitely understood?
Nobody has read this article?
Jurors (sic.): No sir."

Section 427 of the Code of Criminal Procedure provides that "after the jury have retired for deliberation * * *" and request instructions, upon their being brought into court, the instructions in felony cases must be given in the presence of the defendant. Since the jury had not yet retired for deliberation in the case at bar, Fein's reliance upon a violation of this section is misplaced.

Section 356 of the Code of Criminal Procedure provides:

> "If the indictment be for a misdemeanor, the trial may be had in the absence (sic.) of the defendant, if he appear by counsel but if the indictment be for a felony the defendant must be personally present."

Fein relies on *People* v. *Anderson*, 16 N.Y. 2d 282 and *Evans* v. *U. S.*, 284 F. 2d 393 to support his claim that his absence from the jury room when the trial judge questioned the jury about the newspaper article was a violation of section 356 of the Code of Criminal Procedure and his constitutional rights under the Fourteenth Amendment. Both cases are distinguishable. *Anderson* involved a suppression hearing where there was a "taking of evidence" and the court held there was a denial of due process and a violation of section 356 of the Code of Criminal Procedure. In *Evans* the Judge gave instructions to the jury after they had retired for deliberation in the absence of the defendant although his counsel was present and the court held that the error was not cured by the court reporter later reading the instructions to the jury in the

presence of the defendant. There, additional instructions which constituted the law of the case were being read to the jury without the opportunity of the defendant to personally object to any part of the instructions. In the case at bar, no evidence was being taken and no instructions were being given to the jury. The trial judge was conducting a voir dire of the jury as to a newspaper article which was not evidence in the case, but merely some publicity about it which some of the jurors had read and only one had seen.

In the case of *People ex rel Lupo* v. *Fay*, 13 N.Y. 2d 253, relator was absent from the court room while there was being argued his counsel's motion for a mistrial on the ground that requiring further deliberation by the jury would amount to coercing a verdict. The Court of Appeals in upholding the dismissal of the writ of habeas corpus stated:

> "While not directly controlling on us, *Snyder* v. *Massachusetts* (291 U. S. 97; defendant absent during jury's 'view' of the locus) is a sound, fair guide for decision in such cases. Due process, held the Supreme Court in *Snyder*, mandates the presence of a defendant at his felony trial to the extent only that his presence is necessary for a fair and just hearing of his cause and he must be deemed to have the absolute right to hear everything the jury hears (see *United States* v. *Johnson*, 129 F. 2d 954, affd. 318 U. S. 189) so that his may be the opportunity to confront his accusers and advise with his counsel. Justice Cardozo wrote that the inquiry should be: whether the defendant's presence at the particular trial stage had 'a relation, reasonably substantial to the fullness of his opportunity to defend against the charge' (*Snyder* v. *Massachu-*

setts, 291 U. S. 97, 105-106, *supra*). Application of that test here defeats the writ" (13 N.Y. 2d at pp. 256, 257).

Fein's absence from the jury room while his counsel, the prosecutor and the judge were questioning the jury about a newspaper article did not affect any substantial right of Fein and did not invalidate the subsequent judgment of conviction. The questioning of the jury was not a material part of the trial. Moreover, no motion was made for a mistrial because one of the jurors saw the newspaper article, nor is there any proof that that juror had formed an opinion as a result of seeing it. (See *People v. Lynch*, 23 N.Y. 2d 262, 270, 271).

Petitioner previously alleged before the Federal District Court that he was denied a fair trial because of publicity surrounding his arrest and trial, which publicity included the Breslin article in the New York Herald Tribune. Judge Palmieri rejected this argument and held that petitioner was accorded a fair trial (*U. S. ex rel Fein v. Deegan*, 298 F. Supp. 359, 364).

It is unnecessary to consider the question of waiver since the relator's absence at the particular trial stage had no relation reasonably substantial to the fullness of his opportunity to defend against the charge.

Accordingly, the writ is dismissed and Relator is remanded to the custody of the Warden of Green Haven Prison.

Submit judgment on notice.

Dated: January 19, 1970

W. Vincent Grady
Justice Supreme Court

Appendix [illegible]

Verified Petition of Petitioner Mark Fein

SUPREME COURT

County of Dutchess

[Name Title]

To the Supreme Court of the State of New York, County of Dutchess:

Mark Fein, the petitioner, being duly sworn, on oath, deposes and says:

1. I am in the custody of the Honorable Harold W. Follette, Warden of Green Haven Prison, Stormville, New York, as No. 0111P 12009, on an illegal sentence of 30 years to life.

2. My present restraint is unlawful for three reasons:

A. New York Judiciary Law §597, as applied in New York County, resulted in the systematic exclusion of individuals who had conscientious scruples against capital punishment from the venires or panels from which the grand jury which indicted me was selected in violation of the due process and the equal protection clauses of the Fourteenth Amendment.

B. New York Judiciary Law §597, as applied in New York County, resulted in the systematic exclusion of scrupled individuals from the venires or panels from which the petit jury which convicted me was selected, in violation of the due process and the equal

protection clauses of the Fourteenth Amendment, as well as the Sixth Amendment's guarantee of the right to trial by an impartial jury, made fully applicable to the states by the due process clause of the Fourteenth Amendment.

C. The trial judge conducted part of the trial which resulted in my illegal sentence of thirty (30) years to life without my being personally present, in violation of the New York Code of Criminal Procedure §§356 and 427, as well as the due process clause of the Fourteenth Amendment.

3. The trial which led to my illegal sentence took place in the Supreme Court of New York County before Mr. Justice Gerald P. Culkin and a jury. It lasted from Monday, October 19, 1964 until Wednesday, November 25, 1964. The jury retired to deliberate at a few minutes past 7 o'clock on Monday night, November 23, 1964. The jury brought in its verdict of murder in the second degree a few minutes before 3 o'clock in the early morning hours of Wednesday, November 25, 1964. The jury was out over fifty-five (55) hours. On May 26, 1965, Mr. Justice Culkin imposed on me my illegal sentence. There was a direct appeal in the state courts as well as a habeas corpus proceeding in the federal courts. *People* v. *Fein*, 18 N.Y. 2d 162, 272 N.Y.S. 2d 753, 219 N.E. 2d 274 (1966), *affirming* 24 A.D. 2d 32, 263 N.Y.S. 2d 629 (1965), *review denied*, 385 U.S. 649 (1967); *United States ex rel Mark Fein* v. *Deegan*, 410 F 2d 13 (2d Cir. 1969), *cert. denied* 89 S. Ct. 1997 (1969). However, in none of these proceedings were any of the points raised which are presented in the instant petition.

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4. Section 597 of the New York Judiciary Law provides:

> *Jurors with scruples against death penalty*
>
> No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death penalty and that such scruples would prevent him from returning an indictment, or returning a verdict of guilty, or any crime punishable by death. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above. A judge presiding at a term of court at which a crime punishable by death is to be tried may direct that a separate drawing be conducted for the jurors to report for trial of such crime and that only the ballots of jurors who have stated that they have no such scruples shall be placed in the ballot box from which such jurors are to be drawn.

The last sentence beginning "A judge presiding" was added effective September 1, 1965, the same date that the repeal of New York's blue ribbon statute, former 749-aa of the New York Judiciary Law, went into effect.

5. On information and belief, section 597 of the New York Judiciary Law, as applied in New York County, resulted in the automatic exclusion without any further questioning or the opportunity for it, of all individuals who had conscientious scruples against capital punishment from the venires or panels from which grand as well as petit

jurors were taken. On information and belief, such individuals constituted a recognizable, identifiable group consisting of half or more than half of the people in New York County in 1964. As Mr. Justice Stewart wrote in the Court's opinion in *Witherspoon v. Illinois*, 391 U.S. 510, 519-20: "* * * Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community * * *."

6. Pursuant to Section 597 of the New York Judiciary Law, Rule 17 of the Rules of Jury Service applicable in New York County, and in force since March 14, 1941, provides a form of questionnaire to be filled out by prospective jurors, which contains the statutorily worded, double-barrelled question which asks the individual both whether he has scruples and whether they will prevent him from finding a defendant guilty in a capital case. On information and belief, individuals who filled out this questionnaire did not understand the double-barrelled nature of this question, and were not questioned about their answer. Those who were opposed to capital punishment simply answered in the affirmative. Moreover, all those who answered in the affirmative were automatically excluded from the venires or panels from which grand as well as petit jurors were taken.

7. On information and belief the official in New York County who did the excluding was the County Clerk. New York Judiciary Law §590 provides:

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County clerk to select, draw, summon and empanel jurors

The county clerks of the counties included within a city having a population of one million or more shall select, draw, summon and empanel all jurors for all courts within their respective counties and shall decide upon their qualifications and exemptions, in the manner prescribed by this article, those sections of the code of criminal procedure regarding grand jurors, or the rules adopted pursuant thereto, provided, however, that when preparing ballots for jurors, he shall indicate on the ballot of each juror whether he has conscientious scruples against the death penalty as would prevent him from returning a verdict of guilty of any crime punishable by death. But this section shall not operate to impair the right to challenge a particular juror at a trial.

On information and belief, the records of the County Clerk of New York County consist of questionnaires filled out by prospective jurors, under Rule 17 of the Rules of the Jury System in the City of New York, as well as index cards or index books. Rule 2 of the Rules provides: "A county clerk, instead of using index cards, may keep the required information in properly indexed books." In summary, on information and belief, section 597 of the New York Judiciary Law as applied in New York County by the County Clerk and those under him resulted in the automatic exclusion without any further questioning or the opportunity for it of all individuals who had conscientious scruples against capital punishment from the venires or panels from which grand as well as petit jurors were taken. Trial counsel especially were thus denied any op-

portunity to question those individuals as to the nature and nuances of their beliefs and their ability or likelihood in certain cases of putting aside their scruples. Such individuals were simply and automatically excluded.

8. In addition, petitioner, on motion of the prosecution and over petitioner's objection, was tried under New York's blue ribbon jury statute. The prosecution moved for a special jury under former section 749-aa of the New York Judiciary Law as then in effect and applicable to counties having a population of one million or more inhabitants (i.e., only certain counties in New York City). New York subsequently repealed the special jury statute in its entirety; but the repeal was effective September 1, 1965, and hence inapplicable to the petitioner's trial and conviction. The petitioner opposed the motion. He urged the court to follow *Schuster v. City of New York*, 25 Misc. 2d 670, 205 N.Y.S. 2d 190 (Sup. Ct., Kings County 1969), which, in denying the motion for a special jury in a civil case relied on the dissenting opinion in *Fay v. New York*, 332 U.S. 261 (1947). The petitioner quoted *Schuster:*

> "There can be no true equal representation of a community if jurors are selected because of an alleged economic, social, or superior educational status. * * * There is no justification today for a jury system which divides citizens into special or blue ribbon jurors and ordinary or general jurors. Such discrimination short-circuits our democratic processes. * * *"

25 Misc. 2d at 684, 205 N.Y.S. 2d at 205. The petitioner then alleged that under the Constitution of the United States and the command of the Supreme Court of the United

States, the New York special jury statute was "no longer valid or viable." The prosecution's motion was nevertheless granted, and a special jury was empaneled at the petitioner's trial.

9. There were 400 persons on the special jury panels (250 on the original panel and 150 on the additional panel) from which the special jury was drawn; and it is obvious from an inspection of the lists that the panels were exceptionally top heavy with professional and executive people, that they contained very sparse representation of ordinary workingmen or daily wage earners—particularly, "blue collars" workers, and that they contained only 11 women out of the 400 persons. The full exclusionary picture in the petitioner's case thus is this: under section 597 of the New York Judiciary Law as applied in New York County there was the systematic, total and automatic exclusion of all individuals who had conscientious scruples against capital punishment from the venires or panels from which grand as well as petit jurors were taken. In addition, New York's blue ribbon statute, former section 749-aa of the New York Judiciary Law, as applied, compounded this unconstitutional course of conduct by the further severe discrimination against women and lower economic groups on the venires or panels from which the special jury which tried petitioner was drawn. The systematic exclusion of individuals who had conscientious scruples against capital punishment from the venires or panels from which the grand jury which indicted petitioner was taken violated the due process and equal protection clauses of the Fourteenth Amendment. The systematic

exclusion of scrupled individuals from the venires or panels from which the special jury was taken which tried me, plus the additional exclusion of women and members of lower economic groups from this special jury, violated the due process and equal protection clauses of the Fourteenth Amendment as well as the Sixth Amendment's requirement for trial by an impartial jury, made fully applicable to the states by the due process clause of the Fourteenth Amendment.

10. The third reason why my present restraint is unlawful is that the trial judge conducted part of my trial without my being personally present. During the course of the trial, and on November 18, 1964, Jimmy Breslin had a lengthy article in the New York Herald Tribune, which from its contents must surely have been inspired by Frank Lyons, one of the detectives on the prosecutor's staff. I am attaching a copy to my petition. Breslin categorically stated that I killed the decedent, deprecated my conduct in the courtroom, called my father a millionaire, and gave a maudlin account of some of the next of kin of the decedent, who were engulfed in this tragedy. Because of the article's particularly prejudicial nature, defense counsel promptly brought it to the court's attention. The trial record shows:

> "Mr. Kleinman: Your Honor, I know that you have very scrupulously instructed the jury not to read and not to discuss and not to comment on the case, all the usual admonitions and instructions were given that the jury should not be the least bit disconcerted from their duties here in the courtroom, and I appreciate

that, and I want to thank your Honor for all the admonitions you have given the jury.

I just place before your Honor a column written by the columnist Jimmy Breslin of the New York Tribune. It is on the first page of the second section of the newspaper of November 18th.

In my opinion, the column—and I don't want to characterize it too much—is one which is extremely detrimental to the defense, and I should like to have the column marked as an exhibit, so that if any reference is made to it we will have something on the record to indicate what we are talking about.

I should ask your Honor most respectfully to address the jury to find out if they happened to see or look at a column written by this Jimmy Breslin in today's Tribune.

The Court: Do you want me to do that in open court or what?

Mr. Kleinman: I leave it entirely to your Honor. I don't want to make any fuss about it in open court, and I don't think it will do any good to do it in open court. It will simply accentuate it.

Mr. Dermody: Yes, that is the danger.

The Court: I will do it in the jury room.

Mr. Kleinman: May I have it marked?

The Court: It is marked for identification.

(New York Tribune for November 18, 1964 marked Defendant's Exhibit R for Identification.)

The Court: Mr. Renfroe, gentlemen of the jury: Do not discuss any fact or feature of the case. The jury will retire to the jury room.

(The following took place in the juryroom, all the jurors and alternate jurors being present, and also all counsel.)

The Court: It has been called to the Court's attention that an article has appeared this morning on

the first page of the second section of the Tribune. The whole column was in reference to this case. Have any of you gentlemen seen it?

A Juror: I saw it.

The Court: Did you read it?

A Juror: I saw it but I didn't read it.

The Court: I cannot admonish you more strongly that I am at the present time, and I have advised you time and time again not to look at or read anything pertaining to this case. Now, if you do so, gentlemen, you do so under penalty of a penal imprisonment. You have already been told that. Otherwise the whole case would have to be set aside and retried.

I tell you not to look at any papers or have any one call anything to your attention concerning this case, or anything that may be written by anyone any place, at any time.

Now, is that definitely understood?

Nobody has read this article?

Jurors: No, sir.

The Court: Don't let this be a suggestion that you should inquire about it, because you are absolutely forbidden so to do. Thank you.

(The jurors and alternate jurors enter the courtroom and take their respective seats in the jury box.)

The Clerk: Trial in the case of the People of the State of New York against Mark Fein is continued. The defendant, each of his counsel and the District Attorneys are present."

As this excerpt shows, the voir dire of the jury was most perfunctory. A juror was permitted to say that he had seen the offending article, but had not read it, and there was no further probing. The juror was not asked whether he saw the headline or the sub-headings "A Look of Hate"

and "A Dazed Son". He was not asked what his reactions were to these sub headings. It was as if everybody wanted to get on with the trial, even if this meant an impairment of my rights. After the juror answered that he had seen the article, but had not read it, the trial judge gave a further admonition, hopefully asked the leading question, "Nobody has read this article?", got his desired answer from the jurors, "No, sir", and that was that.

11. Had I been present, I would not have been content, I would have asked the juror who saw the article, "what did he see, what was the headline? Did he see the sub headings, "A Look of Hate" and "A Dazed Son"? What were his reactions to these sub headings?" I am appalled at the cavalier and perfunctory way in which the voir dire of the jury was conducted. Breslin's article was most injurious. It made fun of me, of my wife, and of my father. It tried to create sympathy for the next of kin of the decedent, and they were entitled to sympathy, but not at my expense. But Breslin categorically stated that I was guilty. Thus, the article was most injurious to me. It was destructive of my rights to a fair trial. I would not have the juror who saw the article to continue as a juror. I would have insisted through my counsel on further questioning not only of this juror but of the other jurors. Furthermore, I was entitled to be present when the jurors were questioned and to observe their demeanor.

12. But I was not present. I was in custody. Although I had been out on bail, the trial judge remanded me at the commencement of the trial, and he did so without any good

reason for it. I was thus handicapped in my consultations with my counsel. Moreover, I could not keep abreast of things. I did not know about the Breslin article. Therefore, I could not consult with my counsel about it. I did not know what was going on when the trial judge was conducting his voir dire of the jurors in the jury room about the Breslin article. I was not present, nor was I asked to be present. This conduct of the trial judge in questioning the jurors about the Breslin article, in my absence, and without my consent, was in violation of Sections 356 and 427 of the New York Code of Criminal Procedure, as well as the due process clause of the Fourteenth Amendment.

13. At the very least, and in any event, I am entitled to a hearing in which I will establish that under section 597 and former section 749-aa of the New York Judiciary Law, there was not only the systematic exclusion of scrupled jurors from the venires or panels from which grand as well as petit jurors were taken, but also that under New York's blue ribbon jury statute there was further discrimination against blue collar workers and women. At the very least, and in any event, I am entitled to make a record.

14. I want to demonstrate by live testimony, subject to cross-examination, that section 597 as applied in New York County resulted in the automatic exclusion of all scrupled individuals without any questioning, or the opportunity for it, as to the nature or nuances of their beliefs or their ability or likelihood in certain cases of putting

aside their scruples. The petitioner's proof will show that such individuals were excluded from the venires or panels from which grand as well as petit jurors were taken. Trial counsel were thus denied any opportunity to question them. Such individuals were simply and automatically excluded.

15. At the requested hearing I also want to show by live testimony, subject to cross-examination, that death-qualified jurors are partial to the prosecution on the question of guilt or innocence.

16. I feel that it is relevant to add a few words about myself. I am innocent of the killing of the decedent, or of any other human being for that matter. I am not capable of such an act. What happened was that I was framed by the people's chief witness, one Carmela Donofrio Lazarus, whom the Appellate Division termed "a woman with an extraordinary number of aliases." *People* v. *Fein*, 24 A.D. 2d 32, 33, 263 N.Y.S. 2d 629, 631 (1st Dept., 1965). During the trial she was usually referred to as Gloria Kendall, or Kendal, except that the prosecutor called her Mrs. Lazarus. She was a madam and a procuress as well as a prostitute, and had a string of call girls. The Appellate Division described her as "a completely amoral person who could well merit the defense's description as a depraved character." *People* v. *Fein*, 24 A.D. 2d at 36, 263 N.Y.S. 2d at 633.

17. Without Carmela (alias Gloria's) story about my confession to her of murder, there was no case against me, as the prosecutor himself admitted:

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"Q. * * * so that on that day, as matters stood at that time, the prosecution had no case against Mark Fein, right? A. That's right."

18. I have desired at all times to tell the whole truth concerning the fantastically false accusation against me. However, on the advice of my former counsel that the prosecution had failed to make out a case and that no jury would believe its chief witness, who was a confessed disreputable character, I did not take the stand.

19. It was Carmela (alias Gloria) who called me to the apartment at 63rd Street on October 10, 1963, and not I who called her. I then had no knowledge whatsoever of the murder of Reuben Markowitz, whether planned or already accomplished. It was she who astonished me by asserting that Markowitz had been murdered. My shock at this startling news grew to panic when she threatened that because the trunk was in an apartment associated with me, I would be involved in the entire matter. All that she asked was that the trunk be removed from the apartment. The possibility that my association with Carmela (alias Gloria) Kendal would be exposed to my wife and three children, to my parents and others who had a high opinion of me, and her threat that the trunk was in the apartment and therefore involved me, caused me to act stupidly out of blind fear instead of instantly calling the police. Only one who has been caught in such a trap, can understand the hysteria with which one is seized. Undoubtedly, it was this which Carmela (alias Gloria) Kendal and her confederates had counted on to be able later to extort moneys from me.

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20. I was born in Brooklyn, New York, on July 19, 1932. At the age of 6 I attended the Crown Heights Yeshiva in Brooklyn. As I grew older, at about the age of 10, I went to the Blue Mountain Camp, in East Stroudsburg, Pennsylvania. I was an excellent camper and received numerous awards as a good scout, a good sport, and expert camper, and a boy of good character.

21. My education was obtained mainly in private schools. I attended Brooklyn Ethical Culture Society School, Riverside Military Academy and Adelphi Academy.

22. In June, 1953 I was inducted into the army, where I served for two (2) years and was honorably discharged. Upon my discharge from the army my Commanding Colonel congratulated me for my degree of enthusiasm, cooperation and cheerfulness in carrying out my duties.

23. In June, 1956 I was married and during the next eight years became the father of three children—a son now aged 8, a daughter now aged 6 and another daughter now aged 4. Additionally, I was the adoptive parent of a French orphan, now 8 years of age and a Korean boy, now of the age of 5 years.

24. After my discharge from the army I exhibited a keen interest in business and was importantly engaged in establishing a new can manufacturing plant (Eagle Corporation of New Jersey).

25. I recognized my communal duties, was an active member of the Park Avenue Synagogue, and an enthu-

sinstic worker for the United Jewish Appeal and the Federation of Jewish Philanthropies. Additionally, it had always been my practice to make large donations to charitable and community organizations.

26. At the time of my arrest, I was one of the chief executives of the Fein Container Corporation, employing approximately 300 people, and doing a business in the millions. I played a most active and important role in the founding and conduct of this business. My relations with my employees, customers and suppliers were excellent.

27. Prior to my arrest in the instant case, at the age of 32, I had never been in trouble of any kind. My record was clean.

28. No previous application for the relief herein requested has heretofore been made to any court or judge.

Wherefore, I pray that a writ of habeas corpus issue herein directed to said Harold W. Follette, as Warden of Green Haven Prison, Stormville, New York, commanding him to produce me before this Court at a time and place to be specified in said writ, to the end that this Court may inquire into the cause of my detention and that I be ordered discharged from the detention and restraint aforesaid.

Mark Fein

(Verified September 16, 1969.)

Appendix III

Newspaper Article Annexed to Petition

JIMMY BRESLIN

N. Y. Herald Tribune 11-18-64

The Fein Trial

Everything seemed impersonal. Out in the empty hallway, there is a simple note, and written in black ink, tacked in front of the courtroom. It says "760-64 Mark Fein." A bored clerk scrawled it out before he went home the night before. Inside, the defendant, Mark Fein, sat erect and motionless. He is on trial for the murder of his bookmaker over $25,000. But Fein, featureless and dull-eyed, looked like a guy who wouldn't go for $10 to see an earthquake. The District Attorney Vincent Dermody, was writing left-handed on the legal pad in front of him. He doesn't even look at Fein. To him, Mark Fein is a number 760-64, on an indictment.

The defense attorney, Bill Kleinman, questioned a detective in soft, nearly pure British. The question was about unexciting details and the courtroom was drowsy. There was only Kleinman's voice, and the sound of warm air coming into the room through five wire ducts at the ceiling. It was a dead day in court.

A Look of Hate

Then you caught the look on the three people in the third row. They were sitting back quietly, and not moving or saying anything, but they didn't have to clench their fists

or show anything on their faces because the eyes told you everything.

One of them was dark haired and in a plaid sports jacket and black polo shirt. He kept watching Mark Fein's head and his eyes never left it. Next to him, an older man followed the questioning of the detective. But then his eyes would shift and he would look at Fein. The woman sat on the aisle. She was in a blue plaid coat and she looked across the aisle, at Mark Fein's wife, who was in pink, and his father, who was sitting with his arms folded.

"That's the Markowitz family there in the third row," a court attendant said during a pause.

"I know it is."

They sat and looked, the three of them, until the trial was recessed for lunch. Then they went out into the hallway and one of them, the guy in the sports jacket, was found talking to Frank Lyons, a homicide detective who worked on the Fein case.

He introduced himself as Lou Markowitz, the brother of the murdered bookmaker.

"I don't know what I'm doing here," he said. "I got a grocery store in Brooklyn, 94 Moore Street. I come here only once before and when I went back to the store, my partner says I better sit down, that I look lousy. Then all of a sudden it hit me. My knees started to bend and I felt lousy inside my stomach and inside my head and I went home. I was sick for three days. Now I go home tonight and I'll be sick all over again. I take one look at this guy and what am I going to do? I'm going to get sick."

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He is a short guy with thick glasses and he speaks quickly. He is 40 and he works for a living. He looked over at the other two, the woman and the older man, and nodded at them as they went to the elevators.

"I don't know what it is," he said. "She has to come every day. She's Ruby's sister and she says she has to be here every minute so she can know every detail. She don't want to miss nothing. She wants to sit here and watch what happens to this guy every minute."

"Who is the man?"

A Dazed Son

"The guy, oh he's Naomi's brother-in-law. You know, Naomi is the widow. He comes here every day and then at night he goes home and reports to her exactly what happened. She wants to know everything, too.

Look at them in there, Fein and his wife. They blow kisses at each other. Who has Naomi got to blow kisses at? Huh? Does anybody think of that? And what about her kid? He's 12 and he has to go and say the prayers over the grave for nothing. Because this guy over there kills his father. Do they think of that when they blow kisses at each other?"

"How is the wife?" he asked.

"How good could she be? Her boy is like in a daze for months at a time. He was tight with his father. And her, she had a happy marriage. Not one night he didn't come home. Not one night in his whole life until this guy killed him. So what does she do now at night when she's alone?

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"Let me tell you, Naomi had one good day. When she come to this courtroom and seen this kid and his millionaire father in the courtroom and the kid had guards around him. That was the day. She said she never thought she'd see the day that could happen to these people, with all their big money. But she seen. And let me tell you something. I'm around, I know the score. I don't like cops so much. Forty per cent of them, they can be no good. But these guys here who done this case, I don't care. I told it to them in their face, they are fantastic. And the district attorney. You got no idea how good a man he is. I tell you, I pray to God they win this case, it means something to them."

Appendix IV

Order of the Court of Appeals of the State of New York Denying Leave to Appeal

27 N.Y. 2d 486

STATE OF NEW YORK,

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-fourth day of September A. D. 1970.

Present:

Hon. Stanley H. Fuld, Chief Judge, presiding.

2 Mo. No. 791

The People &c. *ex rel.* Mark Fein,

Appellant,

vs.

Harold W. Follette, Warden,
Green Haven Prison, Stormville, New York,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied.

A copy

SEAL
State of New York
Court of Appeals

Gearon Kimball
Deputy Clerk

Appendix V

Order of Appellate Division, Second Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 25, 1970

Hon. Marcus G. Christ — Presiding Justice
Hon. Samuel Rabin)
Hon. James D. Hopkins) Associate Justices
Hon. Fred J. Munder)
Hon. Arthur D. Brennan)

The People, etc., *ex rel.* Mark Fein,
Appellant,

v.

Harold W. Follette, Warden, Green Haven Prison,
Respondent.

In the above entitled cause, the above named Mark Fein, relator, having appealed to this court from a judgment of the Supreme Court, Dutchess County, dated February 16, 1970, which dismissed a writ in a habeas corpus proceeding; the said appeal having been argued by O. John Rogge, Esq., of counsel for the appellant, and by William C. Donnino, Esq., of counsel for the respondent; due deliberation having been had on said appeal, and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

Ordered that the judgment appealed from is hereby unanimously affirmed, without costs.

Enter:

Herman M. Pogul
Clerk of the Appellate Division

Appendix VI

Judgment of the Supreme Court, Dutchess County

At a Special Term of the Supreme Court, State of New York, held in and for the County of Dutchess at Green Haven Prison, Stormville, New York, on the 16th day of February, 1970.

Present:

Hon. W. Vincent Grady, Justice.

The People of the State of New York,
ex rel. Mark Fein,

Petitioner,

against

Harold W. Follette, Warden Green Haven Prison
Stormville, New York,

Respondent.

Relator, having commenced this proceeding, pursuant to §7001 *et seq.* of the CPLR, by service of a petition, verified the 16th day of September, 1969 and a reply affidavit sworn to the 25th day of November, 1969 by Mrs. Irving Fein and respondent having served his return, verified the 1st day of October, 1969 and the affirmation submitted by Frank S. Hogan, District Attorney of New York County, by William C. Donnino, Assistant District Attorney, New York County, and the matter coming on for hearing before

Appendix VI

the Hon. W. Vincent Grady, at a Special Term, at Green Haven Prison on the 17th day of October, 1969 and the further hearing having been adjourned on November 26, 1969 at Special Term, Westchester County by the consent of all parties herein and after hearing Weisman, Celler, Allan, Spett & Sheinberg, Esqs., Attorneys for petitioner, by O. John Rogge, Esq., Attorney for petitioners in support of said application and Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for respondent, by Vincent A. Marsicano, Assistant Attorney General and Frank S. Hogan, by William C. Donnino in opposition thereto and due deliberation having been had thereon and the Court having filed its decision dated January 19, 1970

Now, therefore, on motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for respondent, it is

ORDERED and ADJUDGED that the writ of habeas corpus is dismissed and relator is remanded to the custody of the Warden of Green Haven Prison, Stormville, New York.

Enter

W. Vincent Grady
J.S.C.

FILED
JAN 20 1971
BEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 1117

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. MARK FEIN,

Petitioner,

against

HAROLD W. FOLLETTE, Warden, Green Haven State Prison, Stormville, New York,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

RESPONDENT'S BRIEF IN OPPOSITION AND APPENDIX

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IN THE

Supreme Court of the United States

October Term, 1970

No. 1117

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* MARK FEIN,
Petitioner,

against

HAROLD W. FOLLETTE, Warden, Green Haven State Prison, Stormville, New York,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

RESPONDENT'S BRIEF IN OPPOSITION

Opinions and Proceedings Below

The Supreme Court of the State of New York, County of Dutchess, rendered judgment February 16, 1970, dismissing petitioner Mark Fein's writ of habeas corpus. The opinion of the court is reported at 61 Misc.2d 826, 306 N.Y.S. 2d 789; and it is reproduced in petitioner's appendix, pages 3a-14a.

The Supreme Court of the State of New York, Appellate Division, Second Department, by order entered May 25, 1970, unanimously affirmed the judgment of the Supreme Court, Dutchess County. The opinion of the Appellate Division is reported at 34 A.D.2d 835, 312 N.Y.S.2d 331; and is reproduced in petitioner's appendix at pages 1a-2a. Fein's instant petition for certiorari is addressed to the Appellate Division.

The Court of Appeals of the State of New York by order entered July 2, 1970, dismissed, upon respondent's motion, Fein's appeal to the court, taken of right, pursuant to N.Y. CPLR §5601(b)(1), "upon the ground that no substantial constitutional question is directly involved." The decision of the Court of Appeals is reported at 27 N.Y.2d 737, 314 N.Y.S.2d XL; and the order is reproduced in respondent's appendix at page RA1.

Thereafter, the Court of Appeals, by order entered September 24, 1970, denied petitioner Fein's motion for leave to appeal to the Court of Appeals by permission. The decision of the court is reported at 27 N.Y.2d 486, 315 N.Y.S. 2d XLVII; and the order is reproduced in petitioner's appendix, page 35a.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(3).

However, the petition for certiorari may be addressed to the wrong court. Since, as noted, Fein took an appeal of right to the Court of Appeals of the State of New York,

and the court dismissed the appeal of right upon the ground that "no substantial constitutional question is directly involved," the petition for certiorari should, it appears, be addressed to the Court of Appeals of the State of New York. *See*, *Fitts* v. *Wallick*, 306 U.S. 282, 284 (1939), *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Matthews* v. *Rowe*, 269 U.S. 262 (1925); *also see*, Cohen and Karger, The Powers of the New York Court of Appeals, §§55(e), 56, and 57, pp. 252-61.

Questions Presented

Whether an alleged violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), should result in the vacating of both the conviction and a sentence not of death.

Whether New York's use of a special jury was unconstitutional.

Whether due process was offended when the trial court —at defense counsel's request and in defense counsel's presence but not defendant's—asked the jury if they had read a particular newspaper article about the case and the jury answered, no.

The Applicable Statutes

Section 597 of the New York Judiciary Law, as it appeared at the time of Fein's indictment and trial, stated:

> "No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death

penalty and that such scruples would prevent him from returning an indictment, or by returning a verdict of guilty, of any crime punishable by death. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above."

Former Section 749-aa of the New York Judiciary Law (repealed eff. Sept. 1, 1963) dealt with the selection of special juries and required that special jurors be selected "from the persons qualified to serve as trial jurors" and that:

"No person shall be selected as a special juror * * * who possess such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death. * * *"

Section 336 of the New York Code of Criminal Procedure, entitled Appearance, states:

"If the indictment be for a misdemeanor, the trial may be had in the absence (*sic*) of the defendant, if he appear by counsel but if the indictment be for a felony the defendant must be personally present."

Statement of the Case

This is Mark Fein's third attempt to gain certiorari in this Court.

By indictment, filed February 25, 1964 petitioner Mark Fein was charged with murder in the first degree. Former N.Y. Penal Law §1044. At the time Fein was indicted and tried, the penalty for murder in the first degree included death. Former N.Y. Penal Law §1044 as amended by N.Y. Laws 1963, ch. 994, §1.

Fein's trial in the Supreme Court of the State of New York, New York County, commenced on October 19, 1964. Fein was tried before a special jury; the use of such juries in New York was abolished the following year. Former N.Y. Judiciary Law §749-aa, repealed, 1965 Laws of N.Y., Ch. 778, §3, effective September 1, 1965.

On November 24, 1964 the jury rendered its verdict of guilt of murder in the second degree. Former Penal Law §1046. The statutory penalty for murder in the second degree was an indeterminate prison sentence, the minimum of which could not be less than 20 years and the maximum of which had to be life. Former Penal Law §1048.

After his conviction, Fein was accorded a lengthy hearing on his motion for a new trial. The motion was denied, and on May 26, 1965 Fein was sentenced to imprisonment for 20 years to life.

Fein's judgment of conviction was affirmed by the New York courts. *People* v. *Fein*, 24 A.D.2d 32 (1st Dept. 1965), *aff'd* 18 N.Y.2d 162 (1966), *rem. amd.* 18 N.Y.2d 722 (1966), *rem. amd.* 19 N.Y.2d 691 (1967). Fein's appeal to this Court was dismissed for want of jurisdiction, and certiorari was denied. *Fein* v. *New York*, 385 U.S. 649 (1967), *reh. den.* 386 U.S. 978 (1967).

Thereafter, Fein sought federal habeas corpus relief, raising most of the same claims presented the state courts on his appeal from the judgment. Again, he was unsuccessful. *United States ex rel. Fein* v. *Deegan*, 298 F.Supp. 359 (S.D.N.Y. 1967), *aff'd.* 410 F.2d 13 (2d Cir. 1969), *cert. denied* 395 U.S. 935 (1969).

Upon the heels of this Court's denial of certiorari to the Second Circuit Court of Appeals, the instant writ of habeas

corpus proceeding was instituted in the New York state courts. Again, Fein has been unsuccessful. *People ex rel. Fein* v. *Follette*, 61 Misc. 2d 826 (Sup. Ct. 1970), *aff'd.* 34 A.D.2d 835 (2d Dept. 1970), *appeal dismissed* 27 N.Y.2d 737 (1970), *leave to appeal denied* 27 N.Y.2d 486 (1970).

Summary of Argument

In this state habeas corpus proceeding and application for certiorari Fein makes several claims: First, he challenges as unconstitutional on their face New York Judiciary Law Section 397, and former Section 749-aa (the special jury provision, repealed in 1965, after his judgment of conviction). Both sections in essence permit the exclusion of veniremen who have conscientious scruples against capital punishment which would prevent them from returning an indictment or verdict of guilt where the crime charged was punishable by death. The statutes embody the principle of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), have been so interpreted by New York courts, and are thus on their face constitutional. *People* v. *DiPiazza*, 24 N.Y. 2d 342, 353-4 (1969); *People ex rel. McChesney* v. *La Valley*, 31 A.D. 2d 1 (3rd Dept. 1968), *lv. to app. den.* 23 N.Y. 2d 644 (1969), *cert. den.* 395 U.S. 970 (1969).

Next, in a bald unsupported allegation Fein alleges that those sections were misapplied, and that persons who had conscientious scruples against the imposition of the death penalty were deliberately and systematically excluded from the grand jury that indicted him and from the special jury that convicted him, regardless whether their views would have prevented them from finding a verdict of guilt. He then concludes that if he could, at a hearing, establish such deliberate and systematic exclusion, he will have

thereby proved that he was denied impartial juries and would be entitled to have his judgment of conviction vacated.

However, exactly the same issue, on exactly the same record that Fein thinks he can make at a hearing, was presented to and rejected by this Court in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). *Also see, Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968).

In *Witherspoon*, a state statute authorized such deliberate and systematic exclusion, and "nearly half the venire of prospective jurors" in *Witherspoon* were eliminated by challenging, under the authority of this statute, any veniremen who expressed qualms about capital punishment. *Witherspoon* at 512-13. On that record, this Court found that the deliberate and systematic exclusion of persons opposed to capital punishment regardless of whether their views would prevent them from finding a verdict of guilt or sentence of death did not deprive a defendant of a fair trial on the question of guilt, but rather, denied him a fair determination of whether the death penalty should be imposed. Conversely, if the death penalty had not been imposed, the systematic exclusion of such scrupled jurors would not void the verdict of guilt or sentence. Indeed, in *Witherspoon*, Mr. Justice DOUGLAS, in a separate opinion, made precisely the same argument that Fein now makes, and concluded that *Witherspoon* was denied a fair cross-section of the community on the question of guilt as well as sentence and thus his whole conviction should have been vacated. The majority of the Court, as noted, rejected this argument.

Next, Fein opines that the exclusion of such scrupled jurors resulted in prosecution prone juries. But the Supreme Court, again in *Witherspoon* and *Bumper*, in the face of more supporting evidence than proffered by Fein, rejected the same argument. *Witherspoon* v. *Illinois*, *supra*, at 516-18, also n. 10 p. 517, and n. 16 p. 520; *Bumper* v. *Illinois*, *supra*, at 545, nn. 5 and 6.

Furthermore, not only did Fein never object to the composition of the grand jury or special jury with respect to the exclusion of scrupled jurors, but Fein's eminent counsel, the late William Kleinman, in an affidavit calling upon the court to use a general rather than a special jury, specifically and strategically disavowed any objection to the summary exclusion of anyone "who had conscientious scruples against capital punishment"; thus, Fein is precluded from raising the issue collaterally. *See United States ex rel. Agron* v. *Herold*, 426 F.2d 235 (2nd Cir. 1970).

Next, Fein argues that the special jury which convicted him systematically excluded blue collar workers and women. This argument was made by Fein on his direct appeal from judgment in the state courts and in his federal habeas corpus proceeding. Both jurisdictions rejected the argument and this Court in both instances declined to review the judgments of the state or federal courts. *People* v. *Fein*, 18 N.Y.2d 722 (1966), *rem. and.* 19 N.Y.2d 691 (1967), *appeal dism.* and *cert. denied* 385 U.S. 669 (1967), *reh. den.* 386 U.S. 978 (1967); *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13 (2d Cir. 1969) *cert. denied* 395 U.S. 935 (1969). And, this Court has twice rejected the argument on its merits. *Fay* v. *New York*, 332 U.S. 261 (1947); *Moore* v. *New York*, 333 U.S. 565 (1948).

Finally, Fein attempts to argue that he was absent from a material part of the trial. At the end of the fourth week of trial Fein's counsel asked the trial court to inquire of the jurors whether they had seen a particular newspaper article about the trial. The request was made at the bench while both Fein and the jury were in the courtroom. Fein's counsel then also suggested that the inquiry not be made in open court. According to defense counsel's request, the court ordered the jury to the jury room and in the jury room, in the presence of defense counsel but not the defendant, the court asked them if they had seen and read the article. All 12 jurors replied that they had not read the article; one juror said he had seen the article but had not read it. Defense counsel satisfied, everyone proceeded back into the courtroom and the trial continued.

On the basis of his absence from the jury room, Fein claims his conviction is void. However, absence from a proceeding that has no "relation, reasonably substantial to the fullness of his opportunity to defend against the charge" is not a violation of due process—particularly where defendant's absence was occasioned by defense counsel. *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934); *People ex rel. Lupo* v. *Fay*, 13 N.Y.2d 253 (1964), *cert. den.* 376 U.S. 958.

Further, there is ample evidence demonstrating that Fein waived his right to be present.

POINT I

The grand jury that indicted Fein in 1964, and the special jury that convicted him in 1965, were properly constituted [answering Fein's petition I and II, pp. 39-44].

In his first two points Fein essentially argues that the grand jury (I) that indicted him in 1964 and the special jury (II) that convicted him in 1965 were improperly drawn and constituted and thereby denied him due process, equal protection of the laws, and—with respect to the special jury—the Sixth Amendment right to an impartial jury.

Specifically, Fein claims that under Section 597 of the New York Judiciary Law persons who had conscientious scruples against the imposition of the death penalty were systematically excluded from serving on grand jury and special jury panels, that such individuals constitute an identifiable group in society, that the systematic exclusion of such individuals is *per se* constitutionally impermissible, and further results, he suggests, in a prosecution-prone jury;* also, he adds, the special jury panels systematically excluded blue collar workers and women.

---

* Technically, it should be noted that Section 597 of the Judiciary Law while applicable to the selection of the grand jury which indicted Fein, did not govern the selection of special juries, only general juries. The selection of special juries was technically governed by former Section 749-aa of the Judiciary Law; however, with respect to the provision regarding individuals with conscientious scruples against capital punishment both sections were alike.

Judiciary Law §597 and former §749-aa are constitutional on their face.

The applicable statutes [Judiciary Law §597 and former §749-aa] do not exclude from grand jury or special jury service individuals opposed to capital punishment. Rather, the statutes exclude only individuals who have such conscientious scruples against the death penalty as would prevent them from finding an indictment or verdict of guilty for a crime punishable by death.* And these statutory prerequisites to grand jury or special jury service embody the principle of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and have thus been held constitutional [*People* v. *DiPiazza*, 24 N Y 2d 342, 353-4 (1969); *People ex rel. McChesney* v. *LaFaller*, 31 A D 2d 1 (3rd Dept. 1968), *lv. to app. den.* 23 N Y 2d 644 (1969), *cert. den.* 395 U. S. 970 (1969)].

Fein has shown no basis for a hearing to determine whether Judiciary Law §597 and former §749-aa were misapplied by the County Clerk.

Grasping at straws, however, Fein next charges that the applicable statutes were misapplied by the county clerk in that individuals were summarily excluded from grand and special juries simply because they opposed capital punishment, and not, as the statute required, because their opposition to capital punishment would prevent them from rendering a verdict of guilty in a capital case. Fein offers no real proof of this charge, but instead, requests the court to grant him a hearing at which he could examine the county clerk, his records, and even some unspecified number of jurors in

* At the time of Fein's trial for murder in the first degree, New York had not yet substantially abolished capital punishment [*see* N.Y. L. 1965, c. 321, §1, eff. June 1, 1965].

the hope that he could prove his charge. However, no hearing is necessary, for two reasons: First, hearings should not be held willy-nilly on the basis of bald unsupported accusations, particularly where there is a presumption of regularity in the application of the statute [*People* v. *Ferguson*, 55 Misc.2d 711, 719-20 (Sup. Ct. 1968) (SHAPIRO, J.), *upheld* 25 N.Y.2d 728 (1969); *cf. People ex rel. Eich* v. *Wilkins*, 17 N.Y.2d 621, 623 (1966); *People ex rel. Durant* v. *McKendrick*, 30 A.D.2d 1021 (3rd Dept. 1968)].

Second, even if the statutes were, as argued by Fein, misapplied by the county clerk, none of Fein's constitutional rights was infringed upon. For, whether the county clerk properly or improperly applied the statute is irrelevant unless a defendant can show that the particular application made by the clerk was "an invidious discrimination" such that the "ultimate end—a fair * * * jury proceeding—was not obtained" [*Beck* v. *Washington*, 369 U. S. 541, 554-5 (1962); *also see Fay* v. *New York*, 33 U. S. 261 (1947)]. As we shall proceed to show, Fein has in no way demonstrated that his right to a fair jury hearing would have been infringed had the county clerk, as he claims, misapplied the applicable statutes.

Even under Fein's theory that the applicable statutes were misapplied, he was not denied a jury that was representative on the issue of guilt.

Assuming *arguendo* that the applicable statutes were misapplied so as to exclude from juries individuals who opposed capital punishment without inquiring whether their beliefs would prevent them from finding a verdict of guilty in a capital case, it does not follow—as Fein argues—that

such exclusion constituted a *per se* constitutional violation of Fein's alleged constitutional right to a jury chosen from a cross-section of the community. On the contrary, this Court has explicitly held that no *per se* constitutional violation would be demonstrated in a case where the sentence is not death [*Witherspoon* v. *Illinois*, 391, U. S. 510 (1968); *also see Bumper* v. *North Carolina*, 391 U. S. 543 (1968)]. These cases make clear that a defendant who is not sentenced to death is not denied a fair jury on the question of guilt even though the jury does not fully reflect a cross-section of community opinions on the issue of capital punishment. He is entitled only to a jury that is not "unrepresentative on the issue of guilt * * *" [391 U. S. at 518], that is, a jury that is not biased, prosecution prone, or more likely to convict than a jury chosen differently. This Court found no such bias "on the issue of guilt."

Thus, in *Witherspoon* v. *Illinois, supra*, the jury was in fact selected in the manner Fein argues the New York statute was misapplied, *i.e.*, individuals opposed to capital punishment were systematically excluded from the jury even though their scruples may not have prevented them from rendering a verdict of guilty in a capital case. As a matter of public policy the State of Illinois authorized by statute such systematic exclusion:

> "'In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.'" [*Witherspoon v. Illinois, supra* at 512, quoting Ill. Rev. Stat., c. 38, §743 (1959)].

At Witherspoon's trial, "the prosecution eliminated nearly half the venire of prospective jurors by challenging, under the authority of this statute, any veniremen who expressed qualms about capital punishment" [*id.* at 513, *also see* 514-15]. As a result, Witherspoon argued (as does Fein) that his "jury was not chosen from a venire representative of a fair cross section of the community as required by the Sixth and Fourteenth Amendments" [*Witherspoon* v. *Illinois*, Briefs of Counsel, 20 L. ed. 2d 1609; *also see Bumper* v. *North Carolina*, Briefs of Counsel, 20 L. ed. 2d 1613].

The only part of Witherspoon's argument that a majority of the Court would accept was that a sentence of death could not be imposed by a jury from which those opposed to capital punishment were summarily excluded without any further inquiry to determine whether their views would prevent them from finding a verdict of guilt in a capital case. As to the sentence of death, therefore, the Court was satisfied that a jury so selected was not impartial, was not representative of the community [*see Bell* v. *Patterson*, 402 F.2d 394 (1968)]; thus, the Court voided Witherspoon's sentence of death, but only his sentence of death. It did not void Witherspoon's conviction, rendered by the same jury, because the Court held that on the question of guilt juries so chosen were not shown to be biased or prosecution prone, and therefore were not constitutionally unrepresentative of the community on that question:

> "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the

issue of guilt or substantially increases the risk of conviction" [*Witherspoon* v. *Illinois*, *supra*, at 517-8].

Similarly, in *Bumper* v. *North Carolina*, *supra*, where Bumper was convicted of a capital crime by a jury chosen as in *Witherspoon* but was sentenced to life imprisonment, the Court, following *Witherspoon*, would not reverse the conviction or void the sentence—it not being of death—on the ground that the jury was unconstitutionally composed [*Bumper* v. *North Carolina*, *supra* at 545]. Further proof that the Court in *Witherspoon* and *Bumper* rejected Fein's hypothesis that the summary exclusion from juries of those opposed to capital punishment results in a denial of representative juries on the issue of guilt can be found in an analysis of Mr. Justice Douglas's separate opinion in both cases. Mr. Justice Douglas fully agreed with Fein's hypothesis and for that reason would have reversed Witherspoon's and Bumper's convictions as well as their sentences of death. Thus, in *Bumper*, Mr. Justice Douglas was recorded as adhering to his views in *Witherspoon*: "Since, however, the record shows that 16 of 53 prospective jurors were excused for cause because of their opposition to capital punishment, he would also reverse on the ground that petitioner was denied the right to trial on the issue of guilt by a jury representing a fair cross-section of the community. *Witherspoon* v. *Illinois*, *supra*, at 523 (separate opinion)" [*Bumper* v. *North Carolina*, *supra*, at 551]. No other member of the Court concurred in Mr. Justice Douglas's opinions.

Thus, in *Witherspoon* and *Bumper*, the Court made it quite clear that a verdict of guilty and a sentence not of death was unimpaired even though individuals who

were opposed to capital punishment were summarily and systematically excluded from the jury without any inquiry to determine whether their views would prevent them from finding a defendant guilty in a capital case.

The special jury system did not unconstitutionally discriminate against blue collar workers or women.

Three times Fein has sought and failed to obtain review by this Court of his claim, rejected by the state and federal courts, that the special jury system was unconstitutional. *Fein* v. *New York*, 385 U.S. 649 (1967) dismissing an appeal from and denying certiorari to the New York Court of Appeals, 18 N.Y.2d 162, 168, *rem. amd.* 19 N.Y.2d 691 (1967); *Fein* v. *New York*, 386 U.S. 978 (1967) denying a rehearing; *Fein* v. *Deegan*, 395 U.S. 935 (1969) denying certiorari to the Second Circuit Court of Appeals, 410 F.2d 13, 22-3 (1969). On this his fourth attempt to have this Court review the constitutionality of the special jury, Fein presents no evidence of such systematic and deliberate exclusion of blue collar workers and women of greater import than previously presented this Court, the Second Circuit Court of Appeals, or the New York courts. In fact, Fein's present brief on the subject is substantially similar to the brief presented this Court and the Second Circuit Court of Appeals in his federal habeas corpus proceeding.

Moreover, the claim that special juries unconstitutionally discriminate against blue collar workers and women and for that reason may be prosecution prone has been raised by many defendants besides Fein, and has been consistently rejected. *Hall* v. *Johnson*, 186 U.S. 489 (1901); *Fay* v. *New York*, 332 U. S. 261 (1947); *Moore* v. *New York*,

333 U. S. 565 (1948); *Vanderwyde* v. *Denno*, 113 F.Supp. 918 (S.D.N.Y. 1953) *aff'd.* 210 F.2d 105 (2d Cir. 1954) *cert. den.* 347 U. S. 949 (1954); *People* v. *Dunn*, 157 N.Y. 528 (1899); *People* v. *Meyer*, 162 N. Y. 357 (1900); *People* v. *Agron*, 10 N Y 2d 130, 141 (1959) *cert. den.* 368 U. S. 922 (1961); *People* v. *Bloeth*, 16 N Y 2d 505 (1965); *People* v. *Maggiore*, 16 N Y 2d 1009 (1965); *People* v. *Torres*, 17 N Y 2d 820 (1966) *rem. amd.* 18 N Y 2d 749 (1966); *People* v. *Horton*, 18 N Y 2d 355 (1966); *People* v. *Jackson*, 20 N Y 2d 440 (1967) *cert. den.* 391 U. S. 928 (1968); *People* v. *Donohue*, 20 N Y 2d 824 (1967)]. Indeed, it is curious why Fein even bothers citing, for example, statistics from *Moore* v. *New York*, *supra*, which he claims prove that special juries which excluded such individuals were prosecution prone, when *Moore* held that those statistics did not prove that special juries were prosecution prone. Similarly, Fein relies on a 1952 Judicial Council report on special juries, which report the federal courts specifically rejected [*Vanderwyde* v. *Denno*, *supra*], and which itself observes:

> "[T]here are no adequate facts that prove that the special jury is a convicting jury since it cannot be assumed that a banker is more 'prejudiced' against a person accused of murder than a plumber, or that males are more prone to convict than females, or that the more educated are so inclined to a greater extent than the less educated * * *" [*id.* at 159].

Further, New York may not have, in the instant habeas corpus proceeding, passed on the merits of Fein's challenge to the special jury, since New York has the salutary rule that a state writ of habeas corpus cannot be used to relitigate the same issues raised and decided on one's

appeal from judgment. *See People ex rel. Rohrlich* v. *Follette*, 20 N.Y.2d 297, 301 (1967); *People ex rel. Gallo* v. *Follette*, 32 A.D.2d 1051 (2d Dept. 1969); *lv. to appeal denied* 26 N.Y.2d 609 (1970); *cf. People* v. *Terry*, 26 N.Y. 2d 265 (1970). And, the opinion of the Appellate Division in the instant case as to issues, other than those presented under *Witherspoon*, merely indicated that it found the "other points" raised by Fein "without merit."

In short, the special jury, an institution of the past in New York, did not unconstitutionally discriminate against blue collar workers and women, and Fein has had his days in court on the issue.

Moreover, Fein should not be heard to complain of a procedure he specifically concurred in.

At no time prior to judgment did Fein protest on any grounds the composition of the grand jury panel, nor did he challenge the composition of the special jury with respect to the exclusion of those opposed to capital punishment. On the contrary. Fein's eminent counsel, the late William W. Kleinman, in his affidavit calling upon the court to use a general rather than a special jury, specifically disavowed any objection to the exclusion from the trial jury of any individual opposed to capital punishment:

> "The qualifications of a member of a special panel and that of a member of a regular panel are the same other than that the former must entertain a belief in capital punishment while the latter need not * * *.
>
> "Since ordinary jurors and special panel jurors have the same qualifications there is no reason for any delay. One question to the assembled panel of ordi-

> nary jurors would dispose of any who had conscientious scruples against capital punishment" [Kleinman's Affidavit, Respondent's Appendix, pp. RA4-7].

Then, during the selection of the trial jurors from the special jury panel, Fein did not register any objection to the questions propounded or the challenges exercised peremptorily or for cause; in fact no request was even made for the voir dire to be recorded. And Fein's ultimate satisfaction with the jury is indicated by his failure to exercise all of his allotted peremptory challenges [*cf. People* v. *DiPiazza*, 24 N.Y.2d 342, 348 (1969)].

New York permitted Fein prior to trial to challenge on constitutional grounds the composition of the grand or special jury panels. *See e.g., People* v. *Dessaure*, 299 N.Y. 126 (1949), *cert. den.* 377 U.S. 949; *People* v. *Agron*, 10 N.Y.2d 130 (1961), *cert. den.* 368 U.S. 922; *also see* N.Y. Code Crim. Proc. §363. And, unlike Illinois in the *Witherspoon* case, New York permitted Fein at the trial to object to the dismissal for cause of any special juror who indicated opposition to capital punishment unless further examination revealed that such beliefs would prevent the jurors from rendering a fair verdict [Code Crim. Proc. §337 (8); *see People* v. *Fernandez*, 301 N.Y. 302 (1950) *cert. den.* 340 U.S. 914].

Consequently, not having properly objected to the composition of the grand or special jury panel or of the special jurors chosen to hear his case, with respect to the exclusion of individuals opposed to capital punishment, and indeed, having affirmatively disavowed any prejudice as a result of such exclusion, Fein cannot now be heard to complain. *Parker* v. *North Carolina*, 397 U.S. 790, 798 (1970); *Michel*

v. *Louisiana*, 350 U.S. 91 (1955); *United States* v. *Ragland*, 375 F.2d 471, 475 (2d Cir. 1967), *cert. den.* 390 U.S. 925; *People* v. *Cosmos*, 205 N.Y. 91 (1912); *People* v. *O'Keefe*, 281 A.D. 409 (3rd Dept. 1953), *aff'd.* 306 N.Y. 619 (1953); *see People* v. *Terry*, 26 N.Y.2d 265, 268 (1970); *cf. People* v. *DeRenzzio*, 19 N.Y. 2d 45 (1966).

> "The Constitution in guaranteeing the accused in a criminal case the 'Assistance of Counsel for his defence' deals neither with a shadowy figure standing beside the accused nor with an abstract idea. It envisages a lawyer, skilled in advocacy, a match for the prosecutor, and in full control of the management for the defense of the trial.
>
> "If such a lawyer chooses not to raise a point of constitutional law in a professionally competent defense, either because he believes he could use material affirmatively to advantage or because he believes it better for his client not to raise it, we would work fundamental changes in the adversary system if we determine he should have done that which he had decided advisedly not to do" [*People* v. *DeRenzzio, supra; also see Henry* v. *Mississippi*, 379 U.S. 433, 451-2 (1965); *United States ex rel. Agron* v. *Herold*, 426 F.2d 125 (2d Cir. 1970)].

Nor is it unreasonable to have required an objection:

> "The jury system is a sacred institution, but it is also a very practical one. The individual has his rights, but so has the state. It would be no less intolerable than impracticable if, after every trial, there could be an investigation into matters affecting the qualifications of jurors which are readily ascertainable in advance. Such procedure would place a premium upon the neglect to ascertain whether a juror is qualified, for few men would challenge a juror if by their failure

to do so they could gain a chance for a new trial in case of defeat" [*People* v. *Cosmos*, *supra*, at 180; *also see United States* v. *Ragland*, *supra* at 675].

Fein has not presented sufficient evidence to support his supposition that prosecution proneness resulted.

In the New York courts Fein also argued that he would prove at a hearing that "death-qualified jurors are partial to the prosecution on the issue of guilt or innocence." (Fein's brief in the New York Supreme Court, Appellate Division, Second Department, p. 302, which brief was submitted to the New York Court of Appeals in opposition to the motion to dismiss his appeal of right). Undoubtedly realizing his inability to prove that special juries and juries which exclude those opposed to capital punishment are prosecution prone, he now merely makes the naked assertion that he believes such juries are prosecution prone and that he need not demonstrate the truth of his belief; he holds that the systematic exclusion of scrupled juries in itself demonstrates the existence of an unfair jury and requires the vacating of his conviction, regardless of his inability to show that the jury was prejudice. *Witherspoon*, as demonstrated, specifically declined to vacate a conviction where there had been systematic exclusion from juries of individuals opposed to capital punishment. And, *Witherspoon*, on more evidence than here presented or proffered, declined to find that such juries were, as a result, prosecution prone. *Witherspoon* v. *Illinois*, *supra*, 391 U.S. at 516-18, also n. 10 p. 517, n. 16 p. 520; *see Bumper* v. *North Carolina*, *supra*, 391 U.S. at 545, nn. 5 and 6. In fact, this Court in *Witherspoon* was, *inter alia*, presented

with "a study based upon interviews with 1,248 jurors in New York and Chicago" which found that juries from which those opposed to capital punishment were summarily excluded, were prosecution prone. The Court found the study insufficient to prove the hypothesis satisfactorily to a court of law [*Witherspoon* v. *Illinois*, *supra*, at 517 n. 10; *also see Bumper* v. *North Carolina*, *supra*, at 545 n. 6].

Fein raised the same issue for the first time in his federal habeas corpus petition, and the Second Circuit Court of Appeals — though holding that it was not formally passing on the merits since Fein had not then exhausted his state remedies on the issue — in *dicta* followed *Witherspoon* and found the claim meritless. The Second Circuit Court of Appeals also correctly indicated that "Witherspoon does hint * * * that the law may change on a different record [but] the studies and reports cited to us [by Fein] are the same as those cited to the Court in *Witherspoon* and *Bumper*. Thus, a different result could not be supported on the present law" [*United States ex rel. Fein* v. *Deegan*, *supra*, 410 F.2d at 23]. And, Fein still offers us no additional evidence; any hearing held to test his hypothesis would truly be in the nature of a fishing expedition in search of evidence to sustain his opinion. *Witherspoon* did not countenance such a result. Neither have courts that have, subsequent to *Witherspoon*, been presented with Fein's prosecution-prone hypothesis and in several cases with more supporting evidence than offered by Fein. *People ex rel. McChesney* v. *La Vallee*, *supra*, 31 A.D.2d 1 (N.Y. 3rd App. Dept. 1968); *Bailey* v. *United States*, 405 F.2d 1352, 1355-6 (D.C. Cir. 1968); *State* v.

Forcella, 245 A.2d 181, 192-3 (N.J. 1968); *Curtis* v. *State*, 243 A.2d 656 (Md. 1968); *People* v. *Hough*, 243 N.E.2d 520, 525-6 (Ill. 1968); *In re Anderson*, 447 P.2d 117, 122-3 (Calif. 1968); *State* v. *Madden*, 449 P.2d 39 (Ariz. 1969); *In re Arguello*, 452 P.2d 921, 923 (Calif. 1969); *In re Eli*, 454 P.2d 337, 339 (Calif. 1969); *State* v. *Peele*, 161 S.E.2d 568, 574 (N.C. 1968); *State* v. *Williams*, 165 S.E.2d 481, 487 (N.C. 1969); *Joseph* v. *Mississippi*, 218 So. 734, 736 (Miss. 1969); *Parks* v. *Texas*, 437 S.W.2d 554, 558 (Tex. 1969)]. And none of the courts which rejected Fein's hypothesis even considered the evidence before them sufficient to remand the case for a hearing; in fact, the high courts of New Jersey and California specifically rejected a defendant's request for a hearing [*State* v. *Forcella*, *supra*; *In re Anderson*, *supra*; *In re Arguello*, *supra*; *In re Eli*, *supra*]. Thus, in *State* v. *Forcella*, *supra*, the defendant's offer of proof consisted of the same materials presented to the Supreme Court in *Witherspoon* plus some "sociological or psychological studies, some under way and others not yet undertaken." In denying the defendant his hearing the court held:

> "But while we welcome whatever aid we can get and would reach for data already in being, we cannot suspend the judicial process until projected studies are made at the behest of a litigant. This is especially true when the studies are of sociological or psychological nature, for the prospect is remote that such studies will yield views of human behavior of such incontestable, eternal truth that existing constitutional doctrines will have to retreat before them. Such studies hold too little promise to warrant what would amount to an indeterminate stay of the judicial process in a critical area" [*id.* at 193].

Indeed, the various factors, psychological and otherwise that would have to be dealt with, and which Fein does not, are formidable; for example:

> "While the Judicial Council has pointed out and investigated the different conviction ratios, it has at no time suggested that the special jury has been inclined to convict except where conviction was warranted. New York extends an appeal on law and fact as matter of right. If there were a tendency to convict improperly, the Judicial Council, which includes the Chief Judge of the Court of Appeals and the Presiding Justice of the Appellate Division, which courts review these cases, would know it. Despite the Council's desire to abolish this jury, no such reasons were ever assigned. No statistics are produced to show that special juries have been more often reversed on the facts than ordinary ones. Of course, it would be impossible for us to say, even were we to examine the cases in detail, whether the difference in percentage of convictions indicated a too great readiness to convict on the part of special juries, or whether the disparity reflected a difference between the ordinary case and those selected for special jury trial, rather than a reflection of an attitude on the part of either panel. It may result from the greater attention and better counsel which the prosecution gives to these important cases" [*Fay* v. *New York, supra,* at 280-1].
>
> "• • • [I]t appears that in Bronx County [and New York County] a system of special and intensive investigation is applied to capital cases from the moment they are reported, more careful preparation is given them and they are tried by the most experienced prosecutors. This makes this class of cases not fairly comparable with the run-of-the-mill cases, felony and misdemeanor, that are included in the ordinary jury statistics" [*Moore* v. *New York,* 333 U. S. 565 (1948)].

Thus, it is significant that the jury, which Fein alleges was prosecution prone because persons opposed to capital punishment were allegedly summarily excluded, acquitted him of the capital offense, murder in the first degree; the Appellate Division, which has jurisdiction to review the facts as well as the law, affirmed his conviction for murder in the second degree; the Court of Appeals, which has jurisdiction over questions of law, affirmed his conviction; and the federal courts, which can review alleged deprivations of federal constitution rights, upheld his conviction. And the statutory requirements that special jurors be able to ignore prejudicial publicity relating to the criminal action, that they not have "such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense," and that they be able to discount in accord with the statute the failure of a defendant to take the stand, could hardly be deemed qualifications designed to secure prosecution prone juries [former Judiciary Law §749-aa (2)].

POINT II

Fein's absence from a proceeding to determine whether the trial jurors were prejudiced by a newspaper article did not violate due process; moreover, Fein waived his right to be present at the proceeding [answering Fein's petition, III, pp. 45-50].

Fein's trial lasted some 5 weeks; towards the end of the fourth week of trial, on November 18, 1964, while Fein, his counsel, the prosecutor, and the jury were present in court, Fein's counsel, William Kleinman, requested permission to approach the bench. There, with the prosecutor present

and out of the hearing of the jury, Kleinman showed the court a newspaper article concerning the Fein trial that appeared in the now defunct *New York Herald Tribune* under the by-line of Jimmy Breslin. Thanking and expressing appreciation to the court for having "very scrupulously" instructed the jury to avoid such articles, Kleinman requested:

> "I should ask your Honor most respectfully to address the jury to find out if they happened to see or look at a column written by this Jimmy Breslin in today's Tribune.
>
> "The Court: Do you want me to do that in open court or what?
>
> "Mr. Kleinman: I leave it entirely to your Honor. I don't want to make any fuss about it in open court, and I don't think it will do any good to do it in open court. It will simply accentuate it."

The prosecutor agreed; and the court, acceding to the request, ordered the jury to retire to the jury room. The court, prosecutor and defense counsel followed the jury into the jury room, but it appears from the record that Fein himself, although in court during the discussion at the bench, was not brought into the jury room.

In the jury room, the court asked the jurors if they had seen the article. One juror stated he had seen the article but added that he hadn't read it. The court then, as it had done on more than 80 separate occasions during the trial, warned the jurors "not to look at or read anything pertaining to this case" and further advised them that a failure to abide by its order would subject them to imprisonment. The jurors again stated that they had not read the article,

and everyone proceeded back into the courtroom and the trial resumed [*see*, minutes of the trial, Respondent's Appendix, pp. RA8-11].

Based on his alleged absence from the court's voir dire of the jurors in the jury room, Fein argued that the prescription of New York's Code of Criminal Procedure Section 356*—that on a trial for a felony "the defendant must be personally present"—was violated as well as the due process clause of the Fourteenth Amendment. Fein is wrong.

As the Court of Appeals has explained, the right to be present at one's felony trial "must be kept within the limits of common sense and reason. It is not literally true that after indictment nothing may validly be done in the defendant's absence * * *" *People ex rel. Lupo* v. *Fay*, 13 N.Y.2d 253, 256 (1964), *cert. denied* 376 U.S. 958 (1964).

In New York a defendant's presence at a post-indictment proceeding has been specifically held required where "testimony [evidence] is being taken, or counsel are summing up, or the jury is being instructed [charged] by the court, or when the verdict is rendered or sentence pronounced" [*People ex rel. Lupo* v. *Fay*, *supra* at 257; *Maurer*

* Fein also argued that Section 427 of the Code was violated. However, a simple reading of that statute demonstrates that it is patently inapplicable to the facts here presented. For, the statute reads:

> "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given after notice to the district attorney and to the counsel for the defendant, and in cases of felony, in the presence of the defendant."

v. *People*, 43 N.Y. 1 (1870); *People ex rel. Bartlam* v. *Murphy*, 9 N Y 2d 550 (1961); *People* v. *Anderson*, 16 N Y 2d 282 (1965); *see People ex rel. McBride* v. *Fay*, 14 N Y 2d 843 (1964) *cert. den.* 380 U. S. 982], or where the court or court official—without even the knowledge of defense counsel—communicates secretly with a juror or a witness [*People* v. *Colascione*, 22 N Y 2d 65 (1968); *also see People* v. *Insoqua*, 28 A D 2d 771 (3rd Dept. 1967); *People* v. *Saccommano*, 25 A D 2d 528 (2d Dept. 1966)]. And, in judging whether absence from a particular post-indictment proceeding voids a judgment, the Court of Appeals has accepted the rule of *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934) (Cardozo, J.) as "a sound, fair guide for decision in such cases":

> "Due process, held the Supreme Court in *Snyder*, mandates the presence of a defendant at his felony trial to the extent only that his presence is necessary for a fair and just hearing of his cause and he must be deemed to have the absolute right to hear everything the jury hears (cit. omit.) so that his may be the opportunity to confront his accusers and advise with his his counsel. Justice Cardozo wrote that the inquiry should be: whether the defendant's presence at the particular trial stage had 'a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge'" [*People ex rel. Lupo* v. *Fay*, *supra* at 256; *also see People* v. *Anderson*, *supra*, at 287].

Clearly, Fein's absence from the court's voir dire of the jury with respect to whether they had seen a particular newspaper article did not have a "relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" of murder. The court's inquiry was completely tangential to the trial on the merits of Fein's guilt of mur-

der. No evidence for or against Fein on the charge of murder was presented to the jury. The truth of the article was not in issue, but rather its effect on the jury, a matter that Fein was in no position to cast light upon. The defendant's belated assertion of prejudice is belied by the conduct of astute counsel at trial, who, to protect his client, initiated the proceeding here in question, but saw no reason why Fein should be present, instead welcoming the opportunity to inquire of the jury outside the courtroom. Indeed, such a proceeding may not even properly be deemed a part of the "trial." It is more of an administrative proceeding undertaken by the trial court, while a trial is in progress, in order to guarantee the defendant a fair hearing during the trial [*see People* v. *Sher*, 24 N Y 2d 454 (1969), *cert. den.* 396 U. S. 837]. Neither Fein's presence (nor that of any lay defendant) could realistically have been of material assistance to his lawyer on such an inquiry, as it could, for example, during the taking of testimony relating to the substantive charge [*see People* v. *Anderson, supra*]. Even in his instant petition, with the aid of new counsel, and with the freedom of hindsight and self-serving declarations, Fein is unable convincingly to demonstrate that his presence could have made any difference in the outcome of the voir dire:

> "Had I been present * * * I would have asked the juror who saw the article, 'what did he see, what was the headline? Did he see the subheadings, "A look of Hate" and "A dazed Son?" What were his reactions to these subheadings' * * * I would not have the juror who saw the article to continue as a juror. I would have insisted through my counsel on further questioning not only of this juror but of the other jurors" [Fein's petition, petitioner's appendix, p. 25a].

The article's subheadings, even if seen, were meaningless unless the article was read. Eleven jurors had not even seen the article. Fein would have had no cause to dismiss the juror who saw but did not read the article [*People* v. *Lynch*, 23 N Y 2d 262 (1968); *People* v. *Sher*, *supra*]. And it borders on the absurd for Fein (or any lay defendant) to suggest that with respect to a matter not involving the merits of, or facts surrounding, the charge of murder he would have told his counsel how to proceed—counsel whom the Second Circuit Court of Appeals described as "an experienced and skillful defense attorney [who] knew how to focus attention upon his client's rights" [*United States ex rel. Fein* v. *Deegan*, *supra*, at 21]. The trial of the case was in counsel's able hands; he reasonably concluded that the defendant's interests were fully protected by the proceeding that occurred.

Further, convincing evidence that Fein's presence could not have affected the outcome of the voir dire of the jurors can be discerned by the comments made by Mr. Justice CULKIN in his opinion denying Fein's post-conviction motion for a new trial:

> "Defendant's contention that prejudicial newspaper publicity 'influenced the jury' is a totally unwarranted charge. In fact, indications are exactly to the opposite, for at least one juror was exhaustively questioned by a representative for the defendant during the course of this trial motion and the defense announced its contention (*sic*) of speaking to other jurors on this subject. Without examining the propriety of this (cit. omit.) it is a fact that not one offer has been forthcoming which would tend to connect newspaper and magazine stories with the jury's deliberations" (3896).*

* Numerical references are to pages of Fein's record on his appeal from judgment. The voluminous appeal record was part of the instant habeas corpus record. See Respondent's Affirmation In Opposition in Respondent's Appendix, p. RA3.

And, it cannot be said that the article itself prejudiced Fein's right to a fair trial, since that argument was rejected by both the New York courts on Fein's appeal from judgment and by the Federal courts in Fein's federal habeas corpus petition [*see, e.g.*, opinion of Palmieri, D.J., 298 F. Supp. 359, 364].

Finally, the majority of the federal circuits will not reverse a conviction on such a claim, even on direct appeal from judgment, where defendant's absence did not prejudice him [*see e.g., United States* v. *Houlihan*, 332 F.2d 8, 13 (2d Cir. 1964); *United States* v. *Woodner*, 317 F.2d 649, 652 (2d Cir. 1963), *cert. den.* 375 U. S. 903 (1963); *United States ex rel. Shapiro* v. *Jackson*, 263 F.2d 282, 283 (2d Cir. 1959); *Glouser* v. *United States*, 296 F.2d 853 (8th Cir. 1961), *cert. den.* 369 U. S. 825 (1962); *Cox* v. *United States*, 309 F.2d 1 (8th Cir. 1962) and cases there cited; *Root* v. *Cunningham*, 344 F.2d 1 (4th Cir. 1965); *Ware* v. *United States*, 376 F.2d 717 (7th Cir. 1967) and cases cited at 719 n. 6].

In short, it is absurd for Fein to suggest that the court's voir dire of the jury "had a relation, reasonably substantial to the fullness of his opportunity to defend against the charge" such that his presence was indispensible. On the contrary, Fein's absence "did not affect any substantial right of his and did not invalidate the subsequent judgment of conviction" [*People ex rel. Lupo* v. *Fay, supra* at 257].

Moreover, it is clear that Fein waived any right to be present, as well he may [*see People ex rel. Lupo* v. *Fay, supra* at 257 and cases there cited; *also see People ex rel.*

Wilder v. *Markley*, 26 A.D.2d 542 (2d Dept. 1967), *app. dism.* 26 N.Y.2d 648 (1970)]. First it is important to understand exactly what Fein alleges concerning his knowledge about the Breslin article and the proceedings in the jury room:

> "I did not know about the Breslin article. Therefore, I could not consult with my counsel about it. I did not know what was going on when the trial judge was conducting his voir dire of the jurors in the jury room about the Breslin article. I was not present, nor was I asked to be present." Fein's petition, petitioner's appendix, p. 26a.

The core of Fein's sworn statement, therefore, is that in addition to being absent from the proceedings, he did not know prior to or during the proceedings about the article or the nature of the proceedings. However, Fein never states exactly when he first learned either about the Breslin article or about what took place in the jury room.

At oral argument in the court below in the instant proceeding, however, Fein's counsel represented:

> "Now, Mark Fein came upon this part of the record up a Green Haven during the thirteen months that I was waiting for a decision from the Court of Appeals for the Second Circuit. * * * And he, reading this record up there, finds out that for this important part of the proceedings, he wasn't even present" [minutes of oral argument, November 26, 1969, before Mr. Justice Grady, Supreme Court of the State of New York, County of Dutchess, page 20].

The record, however, is not consistent with Fein having first learned of this proceeding some years after the event.

Subsequent to Fein's conviction and prior to his sentence, Fein made a motion for a new trial, alleging *inter alia* that he was denied a fair trial due to unfavorable publicity. In his motion papers (144B) and then during the oral argument of the motion, Fein's then counsel, Louis Nizer, Esq., made reference to the article and proceeding; and Fein himself was present during the oral argument (3695, 3758, 3792-3, 3800, 3838, 3842):

> "[Mr. Nizer]: I shall skip the next point, just advert it, Your Honor. It's one of our motions: The jury was influenced by out of court statements in the press.
>
> "One of the jurors said he read one of these terrible stories which turned out to be totally untrue, but he said it wouldn't affect him, and he remained in the jury. Some of these—
>
> "Mr. Dermody [Assistant District Attorney]: Just a moment, Your Honor. I can't sit by. The juror did not say he read this. You recall you questioned him yourself, Your Honor. He said he saw the heading, and he discarded it immediately.
>
> "Mr. Nizer: What did he say, Mr. Dermody?
>
> "Mr. Dermody: He didn't say he read it.
>
> "Mr. Nizer: He saw it and didn't read it. I stand corrected. He saw the article and didn't read it" (3792-3).

In his argument in reply, the assistant district attorney made reference to the incident:

> "A great deal of hub-bub about the fact that one of the columnists wrote a story disparaging the defendant.
>
> "The jurors were questioned about it. Everybody was very much concerned about it" (3838).

Thus, more than five years ago, at the time of his motion for a new trial prior to his sentence, Fein was put on notice of the article and proceeding. And although section 465 of the Code of Criminal Procedure authorizes the granting of a new trial "when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application * * * When the trial has been had in his absence, if the indictment be for a felony * * *," Fein made no such application.

Furthermore, the record indicates Fein was in court when his counsel first approached the bench with the Breslin article, and was in court when his counsel, the prosecutor, the judge, and the jurors retired to the jury room. That Fein did not ask his counsel about the allegedly strange—at least to him—sequence of events that had transpired before his eyes strains credulity. But, it is incredible that Fein's eminent counsel and the other attorneys in the defendant's camp did not see that Fein was informed of everything that took place outside his hearing or presence. Indeed, while memories of the incident have dimmed—understandably given the 5 years that have passed and the inconsequential nature of the incident*—Mark Landsman, Esq. who, while not counsel of record, assisted Mr. Kleinman, has reported that it was the "practice" of Fein's counsel "during the trial to keep Fein informed of the proceedings and conversations that took place out of his presence or earshot during the course of the trial" [*see* Respondent's Affirmation In Opposition, in Respondent's Appendix, pp. RA3-4].

* The entire proceeding from the time defense counsel approached the bench until after the court's voir dire of the jury encompassed 3½ pages of a record on appeal that encompassed volumes.

In his briefs in the New York appellate courts and federal courts, Fein again was quick to refer to the Breslin article and the results of the court's voir dire in an attempt to support his claim of prejudicial publicity. At no time, however, either immediately after the voir dire, during his motion for a new trial, on his direct appeal from judgment, or in his federal habeas corpus proceeding did Fein raise his present claim, assert ignorance of the proceedings or complain of his physical absence. His failure to object at any of these stages of his proceedings would by itself be sufficient to charge Fein with having waived his present claim [*United States* v. *Re*, 372 F.2d 641, 644-5 (2d Cir. 1967)]. But there is more. For, it must be remembered that Fein's counsel called the Breslin article to the trial court's attention, counsel requested the court to ask the jurors only "if they happened to see or look at" the article, counsel suggested that the court not question the jury in open court, where Fein was present, and counsel did not request that Fein be taken from the court to the jury room (see Respondent's Appendix, pp. RA8-11). The entire incident, therefore, was of the defense's own making; it constituted an affirmative act of trial strategy by Fein's counsel. To assert that Fein may now—more than 5 years after judgment and knowledge of the incident—raise an objection to a proceeding his counsel instigated, is to make a mockery of justice and concepts of fairness [*see People* v. *DeRenzzio*, *supra*, 19 N.Y.2d 45 (1966); *People* v. *O'Keefe*, 281 A.D.2d 409 (3rd Dept. 1953), *aff'd.* 306 N.Y. 619 (1953); *People* v. *Bragle*, 88 N.Y. 585 (1882)].

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

MICHAEL R. JUVILER
WILLIAM C. DONNINO
Assistant District Attorneys
Of Counsel

RESPONDENT'S APPENDIX

Order of the New York Court of Appeals Dismissing Fein's Appeal of Right Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Second day of July A. D. 1970.

Present,

Hon. STANLEY H. FULD, *Chief Judge, presiding.*

2 Mo. No. 603

THE PEOPLE &c. *ex rel.* MARK FEIN,

Appellant,

vs.

HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that no substantial constitutional question is directly involved.

A copy

[SEAL]

Gearon Kimball
Deputy Clerk

Respondent's Affirmation in Opposition

SUPREME COURT OF THE STATE OF NEW YORK

County of Dutchess

The People of the State of New York,
ex rel. Mark Fein,

Petitioner,

against

Harold W. Follette, Warden of Green Haven Prison,
Stormville, New York,

Respondent.

William C. Donnino states that he is an Assistant District Attorney, of counsel, to Frank S. Hogan, District Attorney for the County of New York, co-counsel with Louis J. Lefkowitz, Attorney General for New York State in behalf of respondent and do hereby affirm, under penalty of perjury, that the following statement is true.

This affirmation is made in opposition to Mark Fein's petition for a writ of habeas corpus.

Respondent denies upon information and belief each and every material allegation set forth in the petition for the reasons and to the extent stated in respondent's brief, incorporated by reference herein.

The undersigned further states that within the last two weeks he has spoken with and was informed by Mark Landsman, Esq.—an attorney who assisted one of Fein's trial counsel, the late William Kleinman—that although

he (Landsman) has no independent recollection of any conversation wherein he related to Fein what took place in the jury room on November 18, 1964, it was the practice of counsel during the trial to keep Fein informed of proceedings and conversations that took place out of his presence or earshot during the course of the trial.

For the convenience of the court certain other exhibits have been reproduced and attached to respondent's brief; namely, Exhibit A: Fein's point on the special jury in his brief in the New York Court of Appeals; Exhibit B: Fein's point on the special jury in his brief in the Second Circuit Court of Appeals; Exhibit C: William Kleinman, Esq. affidavit in opposition to the district attorney's request for a special jury; Exhibit D: The relevant proceedings of November 18, 1964. Further, for the purposes of this proceeding Fein's record on appeal, part of which respondent refers to in its brief, respondent would have deemed as part of the record in this proceeding to be made available to the court upon request.

Dated: November 14, 1969
New York, New York

William C. Donnino

Affidavit of William W. Kleinman in Opposition to Special Jury 6/18/64

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Indictment No. 760-1964

THE PEOPLE OF THE STATE OF NEW YORK,

against

MARK FEIN,

Defendant.

State of New York)
County of Kings) ss.:

WILLIAM W. KLEINMAN being duly sworn deposes and says:

I am an attorney duly admitted to practice law and am one of the attorneys representing the above-named defendant.

I make this affidavit in opposition to the District Attorney's motion for an order directing that a special jury be drawn and selected pursuant to the provisions of Article 18-B, Section 749-aa of the Judiciary Law to try the issues raised by the indictment herein. Section 749-aa provides as follows:

"4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action

triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action * * * may apply for a special jury to try such issue. * * * Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly."

The District Attorney's affidavit attached to his moving papers makes several conclusory statements which merely follow the language of the statute. No factual background is recited to provide any basis for these conclusions.

The qualifications of a member of a special panel and that of a member of a regular panel are the same other than that the former must entertain a belief in capital punishment while the latter need not.

Therefore, it is reasonable to assume that a panel of regular jurors would find no greater difficulty than special jurors in dealing with intricate questions of law and fact.

In practically every prosecution for murder in the first degree the jurors are called on to determine whether or not

there was an intent to kill, and whether the killing was committed with premeditation and deliberation.

The fact that the jury in this case may also be confronted with deciding whether or not the killing was committed in the heat of passion without an intent to kill does not create any "intricate questions of law and fact" which can be resolved only by special panel jurors.

The District Attorney further claims that, since the question of the death penalty may be involved, unnecessary delay and difficulty will be encountered by an attempt to obtain an ordinary jury.

Since ordinary jurors and special panel jurors have the same qualifications there is no reason for any delay. One question to the assembled panel of ordinary jurors would dispose of any who had conscientious scruples against capital punishment.

As Justice M. Henry Martuscello said in denying a motion for a special panel jury in *Schuster* v. *City of New York*, 25 Misc. 2nd 670 (1960) at 684:

> "Juries were intended to serve as instruments of justice. They cannot fulfill that purpose unless they are truly representative of the community. There can be no true equal representation of a community if jurors are selected because of an alleged economic, social, or superior educational status. Responsibility in our democracy should be shared by all and not a few, and this responsibility extends to passing upon important and serious questions that arise in our courts of justice.

Affidavit of William W. Kleinman in Opposition

> "Juries of character, courage, and independence can only exist in an atmosphere where there is no discrimination in their choice because of social, economic or philosophic reasons. There is no justification today for a jury system which divides citizens into special or blue ribbon jurors and ordinary or general jurors. Such discrimination short-circuits our democratic processes and there is no valid reason why it should continue until the end of time."

It is respectfully submitted that not only has the District Attorney failed to advance a valid factual reason for a special panel jury but that in view of the identical qualifications of the two types of jurors the motion should be denied. This Court should not permit the myth of the superiority of special panel jurors to be perpetuated in this enlightened day. Integration of the citizens of this community is a command of the Supreme Court of the United States and distinctions sought to be created by recourse to a statute no longer valid or viable should be firmly rejected. To do otherwise violates the defendant's rights and privileges mandate by the Constitution of the United States.

WHEREFORE, the motion for a special panel jury should be denied.

WILLIAM W. KLEINMAN

Sworn to before me this
18th day of June, 1964

MARK A. LANDSMAN
Notary Public, State of New York
No. 41-2245425 Qual. in Queens Co.
Cert. filed in Kings County
Term Expires March 30, 1965

Pertinent Minutes of Fein's Trial on November 18, 1964, pages 1674-1678

Trial Continued

Before:

Hon. GERALD P. CULKIN, J.S.C. and a Special Jury.

• • •

APPEARANCES: The same as previously noted.

• • •

(Present: Mr. Dermody, Mr. McKeever, Mr. Reynolds, Mr. Kleinman, Mr. Binder and the defendant.)

(The jurors and alternate jurors enter the court room and take their respective seats in the jury box.)

The Clerk: Part 32 is now in recess. Part 39, October 1964 Term continued is now in session.

Trial in the case of the People against Mark Fein is continued. The defendant, each of his counsel and the District Attorneys are present.

Jurors please answer.

(The names of the jurors and alternate jurors are called by the clerk.)

The Clerk: All the jurors and alternate jurors are present. The witness, Detective James Leman, is continued (1674).

Mr. Kleinman: May I approach the bench, if your Honor please?

The Court: Yes.

(The following discussion took place at the bench, out of the hearing of the jurors:)

Mr. Kleinman: Your Honor, I know that you have very scrupulously instructed the jury not to read and not to

discuss and not to comment on the case, all the usual admonitions and instructions were given that the jury should not be the least bit disconcerted from their duties here in the courtroom, and I appreciate that, and I want to thank your Honor for all the admonitions you have given the jury.

I just place before your Honor a column written by the columnist Jimmy Breslin of the New York Tribune. It is on the first page of the second section of the newspaper of November 18th.

In my opinion, the column—and I don't want to characterize it too much—is one which is extremely detrimental to the defense, and I should like to have the column marked as an exhibit, so that if any reference is made to it we will have something on the record to indicate what we are talking about (1675).

I should ask your Honor most respectfully to address the jury to find out if they happened to see or look at a column written by this Jimmy Breslin in today's Tribune.

The Court: Do you want me to do that in open Court or what?

Mr. Kleinman: I leave it entirely to your Honor. I don't want to make any fuss about it in open court, and I don't think it will do any good to do it in open court. It will simply accentuate it.

Mr. Dermody: Yes, that is the danger.

The Court: I will do it in the jury room.

Mr. Kleinman: May I have it marked?

The Court: It is marked for identification.

(New York Tribune for November 18, 1964 marked Defendant's Exhibit R for Identification.)

Pertinent Minutes of Fein's Trial

The Court: Mr. Renfroe, gentlemen of the jury: Do not discuss any fact or feature of the case. The jury will retire to the jury room.

(The following took place in the jury room, all the jurors and alternate jurors being present, and also all counsel.)

The Court: It has been called to the Court's (1676) attention that an article has appeared this morning on the first page of the second section of the Tribune. The whole column was in reference to this case. Have any of you gentlemen seen it?

A Juror: I saw it.

The Court: Did you read it?

A Juror: I saw it but I didn't read it.

The Court: I cannot admonish you more strongly than I am at the present time, and I have advised you time and time again not to look at or read anything pertaining to this case. Now, if you do so, gentlemen, you do so under penalty of a penal imprisonment. You have already been told that. Otherwise the whole case would have to be set aside and retried.

I tell you not to look at any papers or have anyone call anything to your attention concerning this case, or anything that may be written by anyone any place, at any time.

Now, is that definitely understood?

Nobody has read this article?

Jurors: No, sir.

The Court: Don't let this be a suggestion that you should inquire about it, because you are absolutely (1677) forbidden so to do. Thank you.

Pertinent Minutes of Fein's Trial

(The jurors and alternate jurors enter the courtroom and take their respective seats in the jury box.)

The Clerk: Trial in the case of the People of the State of New York against Mark Fein is continued. The defendant, each of his counsel and the District Attorneys are present.

Jurors please answer.

(The names of the jurors and alternate jurors were called by the Clerk.)

The Clerk: The jurors and alternate jurors are all present. The witness, Detective James Leman, is continued • • • (1678).